Decision **DRAFT DECISION OF ALJ PULSIFER** (Mailed 3/30/98)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service. | R.95-04-043 (Filed April 26, 1995) |
| Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service. | I.95-04-044 (Filed April 26, 1995) |

## O P I N I O N

By this decision, we take a further significant step in our program to open the local exchange market within California to competition. We adopt rules herein governing the nondiscriminatory access to the poles, ducts, conduits, and rights-of-way (ROW) among all telecommunications carriers (TCs) competing in the local exchange market within the service territories of the large and mid-sized incumbent local exchange carriers (ILECs)[1]. In order to provide broadly available facilities-based service, competitive local carriers (CLCs) need access to the poles, ducts, conduits, and ROW owned not only by ILECs, but those owned by other entities controlling essential ROW including electric utilities and by local governments. Nondiscriminatory ROW access to the poles, ducts, and conduits of the ILECs and electric utilities is one of the essential requirements for facilities-based competition in the local exchange market to succeed.

## I. Procedural Background

We establish rules herein regarding ROW access as a crucial part of our continuing program to facilitate the emergence of robust competition for local exchange service within California. We solicited initial comments on proposed rules for access to ROW among telecommunications carriers in conjunction with the initiation of local exchange competition in the incumbent territories of Pacific and GTEC in Phase II of this proceeding. In Decision (D.) 96-02-072, in response to Phase II comments, we concluded that parties had raised a number of complex issues relating to ROW access which were important but which could not readily

[1] Pacific Bell (Pacific); GTE California Incorporated (GTEC); Roseville Telephone Company (Roseville); and Citizens Telephone Company (Citizens).

be resolved at that time. We directed carriers to negotiate any necessary ROW access requirements through contract on a case-by-case basis as an interim measure and stated our intention to further consider the need to define carriers' ROW access rights through a combination of workshops and written pleadings. In the event parties could not reach agreement, we directed them to file complaints for prompt resolution. By Rule 12 in Appendix E of D.96-02-072, we directed that "LECs and CLCs may mutually negotiate access to and charge for right-of-way, conducts, pole attachments, and building entrance facilities on a nondiscriminatory basis."

By ruling dated March 28, 1996, the need for further rules governing access to ROW was designated among the matters to be addressed in Phase III of this proceeding. The record on this issue was developed through written comments and technical workshops. No evidentiary hearings have been held. An initial workshop was held on April 8, 1996, addressing provisions for ROW access among telecommunications carrier. Workshop participants agreed that telecommunications ROW issues also impact municipal and investor-owned electric utility, and that notice of subsequent proceedings on this issue should be provided to such utilities. A ruling subsequently was prepared on May 30, 1996, setting forth the issues identified by the workshop participants, was served on the major investor-owned and municipal electric utilities in California with an invitation to participate in a further workshop.

A second ROW workshop on June 17, 1996, which included representatives of municipal and investor-owned electric utility, provided participants an opportunity to discuss and to further define the relevant ROW issues to be addressed through subsequent written comments. Based on the input from the workshops, a list of issues was prepared by the assigned Administrative Law Judge (ALJ) and submitted for comments by ruling dated

September 10, 1996. Opening comments were received on October 22,1996, with reply comments on November 13, 1996. Comments were filed by the large and mid-sized ILECs, a group of small ILECs[2], by the electric utility[3], by a group of CLCs known as the California Rights-of-Way Coalition (Coalition)[4], by the California Cable Television Association (CCTA) and by AT&T Wireless Services, Inc. (AWS).

Although various municipal electric utility and other local government entities were provided notice of the workshops held in this proceeding and were provided the opportunity to file comments, none chose to comment.

## II. Statutory Authority For ROW Access Rulemaking

The current rights and obligations of public utilities with respect to ROW access are addressed in various federal, state, and local statutes. The rules we adopt herein expand, elaborate , and clarify previously existing access rights and obligations with a view toward promoting a more competitive market for telecommunications services. We establish rules for ROW access in this decision pursuant to our jurisdictional authority, as discussed below.

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[2] The small LECs represent: Calaveras Telephone Company; California-Oregon Telephone Co.; Ducor Telephone Company; Foresthill Telephone Co.; Happy Valley Telephone Company; Hornitos Telephone Company; The Ponderosa Telephone Co.; Sierra Telephone Company, Inc.; and Winterhaven Telephone Company.

[3] Pacific Gas and Electric Company (PG&E); Southern California Edison Company (Edison); and San Diego Gas & Electric Company (SDG&E).

[4] The California Rights-of-Ways Coalition consists of: AT&T Communications of California Inc. (AT&T); MCI Telecommunications Corporation; ICG Telecom Group, Inc.; and MFS Intelenet of California, Inc. The view expressed in the Coalition's comments represent a consensus of the Coalition's members and may not represent all of the views of each member of the Coalition.

The rules we adopt shall apply to all ILECs as well as to investor-owned electric utility under our jurisdiction. As discussed below, we do not have jurisdiction to enforce rules for municipal utilities.

Legal disputes relating to accessing the ROW and support structures of public utilities became significant nationally in the late 1970s as the newly-emerging cable television industry sought to gain access to the utility poles and underground conduit owned by incumbent public utilities. In 1978, Congress enacted the Pole Attachments Act (47 U.S.C. § 224) which gave the Federal Communications Commission (FCC) jurisdiction to regulate the rates, terms, and conditions of attachments by cable television (CT) operators to the poles, conduit or ROW owned or controlled by utilities in the absence of parallel state regulation. More recently, with the accelerated implementation of competition for telecommunications services, Congress has further addressed and modified federal law pertaining to ROW access rights and obligations. In the Telecommunications Act of 1996 (the "Act") Congress expanded the scope of § 224 to include pole attachments by telecommunications carrier. It also gave the FCC the authority to regulate nondiscriminatory access to poles, ducts, conduits and ROW.[5] As amended by the Act, § 224 provides that "a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[6] Section 251(b)(4) of the Act further provides that "all local exchange carriers have the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carriers to competing providers of telecommunications

[5] 47 U.S.C. §§ 224(a)(4) and (f).

[6] 47 U.S.C.§ 224 (f)(1).

services on rates, terms, and conditions that are consistent with § 244." Similarly, § 271(c)(2)(B), checklist item (iii), requires "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by a Bell operating company at just and reasonable rates in accordance with the requirements of § 244."

The FCC adopted rules governing access to ROW in its Interconnection Order, FCC 96-325, adopted August 1, 1996, in conformance with the Act. As set forth in § 224(c)(1), however, the FCC does not have "jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subjection (f) for pole attachments in any case where such matters are regulated by a State." This Commission, therefore, has jurisdiction to exercise reverse preemption, setting our own rules governing access to ROW, and we are not obligated to conform to the FCC rules. The discretion of state and local authorities to regulate in the area of pole attachments is circumscribed by § 253 which invalidates all state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." This restriction does not prohibit a state from imposing "on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." In addition, § 253 specifically recognizes the authority of state and local governments to manage public ROW and to require fair and reasonable compensation for the use of such ROW.

In order to establish our jurisdiction, the Commission must satisfy the conditions of §§ 224(c)(2) and (3), which provide:

> "(2) Each State which regulates the rates, terms, and conditions for pole attachment shall certify to the Commission that - -

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachment, as well as the interests of the consumers of the utility service.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments - -

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) With respect to any individual matter, unless the State takes final action on a complaint regarding such matter - -

i. within 180 days after the complaint is filed with the State or

ii. within the application period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint."

The Commission must prescribe rules governing access to public utility ROW consistent with state statutory law as set forth in Public Utilities (PU) Code § 767 which provides in pertinent part:

> "Whenever the commission, after a hearing had upon its own motion or upon complaint of pubic utility affected, finds that public convenience and necessity require the use by one public utility of all or any part of the conduits, subways, tracks, wires, poles, pipes, or other equipment, on, over, or under any street or highway, and belonging to another public utility, and that such will not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms or conditions or compensation therefore, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. . ."

By virtue of the rules we issue pursuant to the instant decision, we hereby certify to the FCC that we regulate the rate, terms, and conditions of access to poles, ducts, conduits, and ROW in conformance with §§ 224( c)(2) and (3).

### A. The Need For Rules and Tariffs

As a threshold issue, we must address the extent to which the Commission should prescribe detailed rules or require tariffs governing the pricing and other terms and conditions for access to the ROW and support structures of the incumbent utilities.

The Coalition and CCTA propose a detailed set of rules for adoption by the Commission governing various terms and conditions for ROW access. The Coalition and CCTA argue that detailed rules and minimum performance standards are needed to prevent the ILECs and electric utilities from extracting unreasonable terms of access and excessive rents from CLCs through the negotiation process, impeding the growth of local exchange competition. By contrast, the ILECs and electric utilities oppose the adoption of structured rules and favor negotiations of access agreements with recourse to a dispute resolution process in case of impasse.

The Coalition also argues that incumbents should be required to file tariffs covering the pricing and terms for ROW access, in order to mitigate CLCs' lack of equal bargaining power with the incumbent utilities. The Coalition argues that tariffs avoid the danger of CLCs being forced to accept an anticompetitive contract to gain access to an ILEC's facilities.

The Coalition argues that the incumbent utilities, through their control of essential facilities, have little or no real incentive to reach agreement through negotiations, especially where permitting attachments would simply subject them to greater competition and potential loss of market share. In the absence of fixed rules or performance requirements, and in the absence of a prescribed formula governing the calculation of pole attachment rates, the Coalition argues, negotiations alone will not be productive, but will frustrate the introduction of competition, especially for facilities-based CLCs. The Coalition

notes that either through existing affiliates, such as Pacific Bell Communications or GTE Card Services, Inc., and through affiliates that will likely soon be formed by electric utilities, the incumbents will offer competitive telecommunications services of their own. The incumbents' ROW and support structures will be valuable assets for themselves and their affiliates in competing against CLCs.

The Coalition and CCTA propose that the Commission therefore require incumbent electric and telephone utilities to file pole attachment "compliance tariffs" (in compliance with specific provisions in the Commission's decision). The compliance tariffs envisioned by the Coalition and CCTA would, (1) incorporate by reference the rules governing access to incumbent utilities' ROW and support structures adopted by the Commission; (2) contain the per pole attachment rates and per linear foot conduit usage rates presently charged to cable television companies under the contracts which they have entered into pursuant to § 767.5; and (3) set forth the specific charges a utility would collect for copies of any necessary maps, diagrams, and drawings. The Coalition agrees that while some items may be impossible to reduce to tariff form simply because of their infinite variety, negotiation for access to support structures and ROW should always be an option open to an CLC, as long as contracting is not mandatory.

The Coalition is not opposed to CLCs entering into negotiated agreements with incumbent utilities which reflect compensation arrangements different from those contained in the incumbent utility's tariffs. The Coalition believes, however, that negotiations for alternative compensation arrangements are more likely to be successful if, but only if, all parties know, through the adoption of rules requiring incumbent utilities to file "minimum" tariffs, what the standard charge is.

The ILECs and electric utilities oppose the adoption of detailed rules and tariff filing requirements, but believe that the Commission should leave it to the carriers to freely negotiate ROW access through individual contracts. The incumbents argue that the Commission should intervene only where individual carriers cannot agree on specific terms of access. The incumbents argue that detailed rules will unduly constrain the flexibility of parties to creatively negotiate terms and conditions which best fit the individual circumstances of a given carrier. Pacific objects to the Coalition's proposed rules as being overly inclusive, inflexible, and one-sided in favor of the CLCs. Pacific believes that no single set of rules can take into account all of the issues involved in the context of a single installation. In the event that the Commission chooses to adopt detailed rules, Pacific and PG&E have proposed specific modifications to the rules proposed by the Coalition and CCTA. Edison argues that utilities have the best understanding of their system requirements and operating characteristics, and that utility decisions about necessary restrictions to access should be given deference as long as the utility applies its rules in a nondiscriminatory manner to all carriers.

Pacific argues that the Act permits negotiated agreements, which implies that individual rates will differ among CLCs. Pacific disagrees that the term "nondiscriminatory rates" requires exactly uniform rates for all CLCs, including those that also act as cable television providers.

Rather than the tariffing of rates, GTEC advocates the use of negotiated agreements based upon an appropriate costing methodology. With tariffed rates, terms, and conditions, GTEC argues, there is little incentive for parties to negotiate anything different, and the tariffed rate(s) in effect becomes the ceiling. GTEC argues that if the Commission decides that tariffing is appropriate, then an expiration date of no longer than one year be set on the

applicability of the tariff. GTEC believes that market forces could then determine what the rates, terms, and conditions for such access should be in the future.

### B. Discussion

Given the complexities of utility facilities and the diversity of ROW access needs, it is not feasible to craft a set of rules or tariffs which address every conceivable situation which may arise. Individual carriers must negotiate the terms of ROW access based on the particular circumstances of each situation. On the other hand, the adoption of certain general guiding principles and minimum performance standards concerning ROW access is appropriate to promote a more level competitive playing field in which individual negotiations may take place. In order to guide parties in negotiations, we shall therefore adopt a general set of rules governing ROW access which strike a balance in providing some degree of detailed performance standards while leaving discretion to parties to tailor specific terms to the demands of individual situations.

It is unrealistic to expect that all ROW access agreements will be uniform with respect to prices, terms, or conditions. Such differences are acceptable as long as they are justified by the particular circumstances of each situation, and do not merely reflect anticompetitive discrimination among similarly situated carriers. Because telecommunications carriers' ROW requirements and constraints are too diverse to lend themselves to a uniform set of tariff rates and rules for every situation, we shall not require the filing of tariffs covering the terms of ROW access. A similar approach to that adopted for interconnection arrangements in D. 95-12-056 is appropriate here. In D. 95-12-056, in setting interim rules governing interconnection arrangements for local exchange service, we considered whether interconnection arrangements

should be instituted by the filing of tariffs or by contract. Historically, the use of utility tariffs has been relied upon as a way to assure that the rates and terms of service offered by the utility are available on a nondiscriminatory basis. We concluded in D.95-12-056, however, that given the inflexibility and inefficiencies of tariffs, interconnection should be arranged by contract rather than tariff. We concluded that the use of contractual negotiations was more appropriate for the newly emerging world of multiple co-carriers.

We recognize, however, that while the local exchange markets have been opened to competition for some time now, the incumbent utilities still hold a significant advantage in the control of essential ROW corridors and support structures in comparison with CLCs which have only recently entered the local exchange market. We are concerned that the advantages of incumbent status of ILECs and electric utility may have the potential incentive for discriminatory treatment in negotiating terms of access. In D. 95-12-056, we addressed parties' concerns over imbalance in negotiating power by prescribing a set of "preferred outcomes" which were intended to lead to the most efficient and economic interconnection solutions. In approving interconnection agreements, the Commission would consider how well a contract achieved the "preferred outcomes." The "preferred outcomes" were not mandatory requirements, however, and the Commission would still approve an interconnection contract with different terms from those prescribed by the "preferred outcomes" if the proposed terms were mutually agreeable to the parties, were not unduly discriminatory or anticompetitive, and did not violate other Commission rules.

Likewise, we conclude that a similar use of "preferred outcomes" is called for in connection with access-to-ROW arrangements. We shall, therefore, adopt a set of rules as prescribed in Appendix A governing ROW arrangements, and shall administer the rules in the form of "preferred outcomes." Parties may

negotiate their own terms and conditions different from those set forth in our rules, tailored to the particular circumstances of a given situation. Yet, the presence of the "preferred outcomes" embodied in our rules will provide a disciplined point of reference as recourse for negotiations to proceed in a competitively neutral manner. The use of these rules as "preferred outcomes" will help guard against unbalanced negotiating power and unfairly discriminatory treatment, yet provide the necessary flexibility to facilitate mutually agreeable arrangements.

In resolving disputes over ROW access, we shall consider how closely each party has conformed with our adopted "preferred outcomes" and whether proposed terms are unfairly discriminatory or anticompetitive. The burden of proof shall be on the party advocating a departure from our adopted standards in prevailing in a disputed agreement. Within the parameters of our prescribed "preferred outcomes" as default criteria, parties shall have the flexibility to negotiate their agreements governing access, tailored to the particular circumstances of each situation.

## III. General Definitions and Applicability of Rules

### A. Definition of Rights of Way

#### 1. Parties' Positions

The Coalition argues that the term "rights of way" should be understood as analytically distinct from , and larger than, the physical support structures to which wires may be attached for wire communication but should also include the underlying ROW that the utility controls.

The Coalition and CCTA propose that the term "right-of-way" should be defined broadly to encompass:

> "all the real property, physical facilities and legal rights for use of such property and facilities which provide for access on, over, along, under, through or across public and private property for placement and use of poles, pole attachments, anchors, ducts, innerducts, conduits, guy and support wires, remote terminals, vaults, telephone closets, telephone risers, and other support structures to reach customers for commissions purposes." (Proposed Rule II.K.)

GTEC objects to this proposed Coalition definition as being overly broad, arguing that the term "right-of-way" has long held particular legal significance, as a right to pass or cross over the real property of another, but that it does not encompass the right to use the personal property of another, such as telephone closets, vaults telecommunications carrier. Pacific and GTEC argue that the Commission's rules regulating access to ROW should not be interpreted to include all possible pathways to the customer, as sought by the Coalition and CCTA. GTEC believes this Commission should delineate the scope of access by competing carriers to "poles, ducts, conduits, and right-of-ways," as defined in § 251 (b)(4) permitting carriers to "piggyback" along utilities distribution networks.

### 2. Discussion

We conclude that the Coalition's proposed definition of ROW is overly broad, and decline to adopt it. As stated in the FCC Order, the intent of Congress in Sec. 224(f) was to permit cable television operators and telecommunications providers to "piggyback" along distribution networks owned or controlled by utilities as opposed to granting access to every piece of

equipment or real property owned or controlled by the utility.[*] We shall delineate the scope of access to refer to the poles, ducts, conduits, and ROW as defined by § 251(b)(4). An overly broad interpretation of ROW would be unduly burdensome on the owners of facilities and is unnecessary to provide for the reasonable access needs of third parties.

## B. Definition of Nondiscriminatory Access

### 1. Parties' Positions

The Coalition defines "nondiscriminatory access" as access that is uniformly equal in fact, for all rates, terms, and conditions, to the access provided to CT companies, and equal to the access that ILECs provide to themselves. The Coalition believes that the Act, PU Code § 767, and CT companies' existing rights to attach to utility support structures in California at just and reasonable rates pursuant to PU Code § 767.5 create a solid foundation for telecommunications carrier to gain access to utility ROW.

Pacific objects to the Coalition's proposed definition of nondiscriminatory access as being "uniformly equal in fact" with respect to the access which the ILEC provides itself, and to every other telecommunications carrier or CT provider. Pacific argues that such a definition would effectively eliminate any type of creatively negotiated agreements between individual parties and would require an owner to treat itself as a third party. Pacific argues that the Act only requires a utility to provide "access" to its facilities, but not to divest itself of all the benefits (and burdens) of ownership. This provision would also require disbandment of the joint pole associations, in Pacific's opinion.

[*] First Report and Order, para. 1185

In order to achieve the Commission's goal of opening the local telecommunications market to active competition, CCTA argues that the Commission's resolution of ROW issues must incorporate the broadest possible definitions to ensure competitive access to all real property pathways to the customer, including poles, conduits, ROW, easements, and licenses. CCTA seeks, however, to exclude CT inside wire and drops from the facilities subject to ROW access. CCTA makes this assertion on the grounds that CT inside-wiring is a federal matter under the purview of the FCC, and has different characteristics than does telephony inside-wiring. Unlike telephone service, CCTA argues that the cable network is not an essential service, and cable and telephone technologies have different power requirements, signal leakage concerns, and tolerances of interference.

GTEC argues that the Coalition's proposed rules and definitions would turn the ILECs into construction managers and financiers for the CLCs, making every possible piece of equipment and support structure that the ILEC owns subject to access by CLCs at the below cost rate set for CT providers.

PG&E states that the Commission must distinguish between the underlying ROW and the support structures which maybe located in an easement that grants ROW. (PG&E Comments, p. 7.)

The Coalition objects to PG&E's proposed definition of a utility pole which would apply only to wood utility distribution poles with electric supply cables of no greater than 50 kV. The Coalition argues that there is no basis to prohibit telecommunications facilities from being attached to electric support structures with supply cables greater than 50 kV.

### 2. Discussion

We shall consider nondiscriminatory access to mean that similarly situated carriers must be provided the opportunity to gain access to the ROW and support structures of the incumbent utilities under impartially applied terms and conditions on a first-come, first-served basis. Nondiscriminatory access does not mean that the incumbent utility is divested of all of the benefits or relieved of the obligations of ownership. The utility must maintain the ability to manage its assets. No party may attach to the ROW or support structures of another utility without the express authorization from the utility.

Nondiscriminatory access does mean, however, that the incumbent utility cannot deny access simply to impede the development of a competitive market and to retain its competitive advantage over new entrants. The incumbent utility may only restrict access to a particular facility or may place conditions on access for specified reasons relating to safety or engineering reliability. We discuss these conditions below in Section VII. We also discuss below in Section VII the restrictions on third parties' access to space which the incumbent utility seeks to reserve for its own future growth needs. In situations where there is no available space for an additional attachment, the incumbent utility is obliged to negotiate with the carrier seeking access to attempt to find some alternative solution such as rearrangement or modification of the existing space to accommodate the latter carrier's needs. In the event that the Commission must resolve disputes over access rights, the burden shall be on the incumbent to justify any claims asserted in defense of its refusal to permit access.

### C. Renegotiation of Existing Agreements to Conform to Commission Rules

#### 1. Parties' Positions

The Coalition proposes that existing contracts between utilities and CLCs be subject to renegotiation, with Commission review pursuant to General Order (GO) 96-A, if the results of such negotiations yielded anticompetitive terms and conditions.

GTEC believes that any rules which the Commission may adopt relative to ROW and access be applicable to all users of those facilities, regardless of whether a party has an existing agreement entered into during the era of noncompetitive telecommunications providers. Existing agreements for pole attachments and access are subject to the Commission's continuing jurisdiction, and typically include clauses that make them subject to renegotiation or modification in view of an applicable Commission ruling.

Edison and SDG&E disagree with any attempt to *require* renegotiation or to unilaterally change the terms of existing access agreements with electric utilities that were negotiated between the parties to these agreements. Edison questions how an existing contract would be found "anticompetitive" under the Coalition's proposal. Edison argues that GO 96-A does not provide a basis for non-consensual modification of existing access agreements, but only relates to contracts "for the furnishing of any public utility service." Edison contends that the access to electric utility facilities provided by existing access contracts is *not* public utility service and therefore is not governed by GO 96-A. Edison argues that the Commission has a long history of respecting freely-negotiated contracts, even when one of the parties to an agreement later expresses dissatisfaction with some of the terms.

### 2. Discussion

As noted by GTEC, existing agreements for access typically include clauses making them subject to renegotiation in light of a Commission directive. In the case of such contracts, parties shall be free to seek renegotiation of the existing contract to conform to the provisions of this decision. If parties are unable to agree on revised contract terms, any party to the contract may request intervention by the Commission to mediate or arbitrate a solution.

If parties have freely negotiated a preexisting contract and have agreed not to provide for revision of its terms subject to a subsequent action by this Commission, we shall respect parties rights to enter into such a contract and shall not require that they be retroactively modified to reflect the provisions of this decision. We shall place parties on notice, however, that any new contracts for access to utility ROW and support structures executed after the effective date of this decision shall be subject to future modification as a result of any subsequent rules adopted by this Commission. On a prospective basis, our rules shall be applied uniformly to all utility ROW access agreements involving telecommunications carriers.

## D. Applicability of Rules to Commercial Mobile Radio Service (CMRS)

### 1. Parties' Positions

AWS argues that under the nondiscrimination principles of the Act, incumbent utilities must provide all telecommunications carrier, including commercial mobile radio service (CMRS) providers, the same type of access they would afford themselves, regardless of the technology the telecommunications carrier employs. AWS states that CMRS providers will be using poles and other utility facilities in ways perhaps not contemplated by traditional land-line providers, and that any rules adopted by the Commission

must be able to accommodate innovative pole uses required by new technologies.

Among other things, in implementing its own new technology plans, AWS will seek to: (1) place micro-cell devices on top of existing poles; (2) replace some existing poles with taller poles in order to improve signal reception; and (3) use poles similar to a traditional land-line telecommunications carrier, transporting and carrying the call through telephone lines attached to existing poles, to AWS's switch

Traditionally, carriers have not sought access to the tops of poles, nor have they sought pole "change outs," or replacements, purely to improve signal reception. AWS argues that any rules adopted by the Commission should accommodate CMRS providers' need for taller poles and access to the top of poles.

### 2. Discussion

We agree that under the nondiscrimination provisions of the Act, CMRS providers are to be treated in the same manner as any other telecommunications carrier in seeking to obtain access to the ROW and support structures of the incumbent utilities. The Commission should adopt rules that are technology neutral and not discourage innovative technological developments in the provision of utility service. We shall reflect this principle in our adopted rules set forth in Appendix A. We are supportive of the ability of CMRS providers to have access to taller utility poles or to the tops of poles where necessary to provide service absent any valid safety or reliability concerns which may be identified by the incumbent utility.

## E. Applicability of Rules to Municipalities and Governmental Agencies

### 1. Parties' Positions

The Coalition argues that the Commission's rules for mandating access to utility ROW and support structures should apply equally to municipally owned utilities and investor owned utilities in order to promote a competitive market. The Coalition argues that local governmental agencies and municipally owned utilities must be required to make their ROW and support structures accessible to CLCs on a nondiscriminatory basis if all California residents are to benefit from a competitive telecommunications market.

PU Code § 767.5(a)(1) excludes "publicly owned public utilities" from the definition of "public utility," such that the Commission does not have jurisdiction to set the pole attachment rates paid by CT corporations to municipal utilities. In contrast, PU Code § 767 does not specify any such exclusion for "publicly owned public utilities." The Coalition infers therefore that the Commission has jurisdiction under § 767 to order "publicly owned" (i.e., municipal) public utilities to provide access to their ROW to telecommunications carrier, and to regulate the rates paid for such attachments, where public convenience and necessity so require.

The Coalition states that CLCs have encountered particular difficulty in attempting to gain access to ROW controlled by the California Department of Transportation (CalTrans), a state governmental agency which controls many of the most important ROW corridors (including major highways and "bottleneck" facilities like the San Francisco-Oakland Bay Bridge). The Coalition claims that CalTrans seems to have little or no awareness of the public utility status, rights, and needs of CLCs, or of the adverse impacts of delays in

responding to CLC requests for information and access which can cause CLCs to lose potential customers. Streets and Highways Code § 671.5 requires CalTrans to either approve or deny an application for an encroachment permit within 60 days of receiving a completed application. Yet, the Coalition claims that CalTrans frequently fails to meet this time limit.

The Coalition asks the Commission to coordinate with the Governor's Office to urge CalTrans to respond, whenever possible, both sooner and more favorably within no more than 60 days to CLC requests for access to ROW, and to urge CalTrans to adopt a basic "working rule" or presumption that CLC requests for access to its ROW will be granted unless there is, in fact, inadequate space or unless public safety concerns require the request for access to be denied.

CCTA argues that the Commission is required by the California Constitution to exercise its jurisdiction consistent with federal law as provided in the Communications Act of 1934, as amended by the 1996 Act. (Cal. Const., art. III, § 1.) CCTA contends that § 253 of the Act requires a municipal government to manage the use of its ROW by telecommunications providers, "on a competitively electric utility neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis."

CCTA asks the Commission to render conclusions of law in this proceeding concerning limitations on fees that municipal or other governmental entities may charge for the access to their ROW and facilities by CLCs. CCTA asks the Commission to prohibit governments from attempting to circumvent the limitations on fees which a state or local governmental agency may charge under Article XIII A of the California Constitution. Enacted through Proposition 13, this provision restricts the ability of state and local governmental agencies to enact taxes without a two-thirds vote of the state legislature. CCTA

asks the Commission not to permit local governments to attempt to "masquerade" a tax by labeling it a "fee." The Coalition argues that state law limits governmental fees for access to the government's own ROW cost. If the fee charged exceeds actual cost, CCTA argues, the fee is considered to be a tax as a matter of law, and is subject to the cost limits of Article XIII A.

Regulatory fees cover the cost attributable to the government activity regulating the payor. Charges "levied for unrelated revenue purposes" or which exceed the cost of the regulatory activity are not fees but revenue-raising devices and hence taxes, according to CCTA (Beaumont 165 Cal. App. 3d at 234; United Business Comm. 91 Cal. App. 3d at 165).

Also excluded from special taxes are "user fees" which are charged for a service provided by the government to the fee payor. Typical examples include "developers' fees" charged as a condition of issuance of a building permit to cover costs of providing government benefits to the developed property.[7] (Garrick Development Co. v. Hayward Unified School District (1992) 3 Cal. App. 4th 320 ("Garrick") [school facilities fee]; Bixel 216 Cal. App. 3d at 1216 [fire hydrant fee]; Beaumont 165 Cal. App. 3d at 231 [water system facility "hook-up" fee].)

CCTA argues that for exemption from Proposition 13, a user or development fee, like a regulatory fee,

> "must not exceed the reasonable cost of providing the service for which the fee is charged, and the basis for determining the amount of fee allocated to the developer must bear a fair and reasonable relationship to the developer's benefit from the fee."

[7] (Bixel, supra, 216 Cal. App. 3d at 1218, emphasis added.)

Pacific argues that while utilities must provide access to any telecommunications carrier or CT operator under § 224(f), municipal electric utilities are not included within the definition of "utilities" and therefore have no federal statutory duty to provide access at reasonable rates, terms, and conditions, according to Pacific. Likewise, Pacific does not believe that municipal electric utilities are subject to the state statute governing attachments by CT operators (PU Code § 767.5), or the statute requiring access to the facilities of one public utility by another public utility (PU Code § 767). Under the current legal and regulatory framework, therefore, Pacific claims that municipal electric utilities are free to deny access, or to impose onerous terms and conditions.

GTEC believes that both municipal and investor-owned electric utilities have the immediate potential to be formidable competitors in the telecommunications market. In addition, municipal utilities may enjoy other benefits not available to non-governmental providers such as the ability to raise capital tax-free in the public sector and the potential in some instances to regulate advantages for themselves over private utility competitors. Thus, GTEC argues that the rules that are established for the LEC/CLC relationship should be consistently applied to municipal and investor-owned electric utilities as well.

### 2. Discussion

We shall address separately the ROW access issues related to municipal utilities and to other local governmental bodies. We conclude that it is beyond the authority of this Commission to regulate municipally-owned utilities with respect to nondiscriminatory access to their poles, ducts, conduits, and ROW. In County of Inyo v. Pub. Util. Comm'n, 26 Cal.3d 154, 166 (1980), the California Supreme Court stated that under established doctrine, "[i]n the

absence of legislation otherwise providing, the Commission's jurisdiction to regulate public utilities extends only to the relation of privately-owned utilities." (citation omitted) "The commission has no jurisdiction over municipally-owned utilities unless expressly provided by statute." Id. Among other things, the court construed § 216, defining a "public utility" and § 241, defining a "water corporation" as not encompassing a municipally-owned utility.

In light of County of Inyo, § 767 of the PU Code – - which provides that, subject to certain conditions, the commission may require that a public utility provide access to its conduits, poles, and other facilities that are on, over, or under any street or highway, to another public utility – - pertains only to a privately-owned utility.

In § 767.5(a)(1), a "public utility" is specifically defined to "include [] any person, firm, or corporation, except a publicly owned public utility, which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for wire communications." The purpose of § 767.5 was to codify existing practice and to require investor-owned utilities to make available, as a public utility service to CT corporations, the excess capacity or surplus space on their facilities for pole attachment. The Commission, in turn, was authorized to regulate the terms and conditions of such public utility service. The Legislature was careful not to broaden the scope of the Commission's then existing jurisdiction over public utilities, and so explicitly exempted publicly-owned public utilities from the scope of § 767.5.

In 1994, the Legislature enacted § 767.7 recognizing that the requirement that public utilities make available the excess capacity and surplus space on their facilities should apply not just to CT corporations but to all telecommunications corporations. In explaining the purpose and intent of

§ 767.7, the Legislature distinguishes in § 767.7 (a)(2), between privately and publicly-owned utilities in discussing the practices of each, and recognizes that some utilities that have dedicated space on their support structures are "not under the jurisdiction of the commission."

In § 767.7 (a)(3), the Legislature continues to distinguish between "public utility" and "publicly owned utility" support structures, and to note that the use of the latter facilities by those seeking to install fiber optic cable is with the "voluntary permission of the publicly owned utility." Similarly, in § 767.7 (a)(4), the Legislature distinguishes "electric public utilities" and "publicly owned utilities" and finds that both types of utilities may access the fiber optic cables installed by telecommunications corporations to better serve their electric customers.

In § 767.7(b), the Legislature states its intent that "public utilities and publicly owned utilities be fairly and adequately compensated for the use of their rights of way and easements for the installation of fiber optic cable" and that electric utilities and publicly owned utilities have access to fiber optic cables for their own use. While some parties may read §§ 767.5 and 767.7 as an intent by the Legislature to narrow the commission's jurisdiction as if it previously extended to both publicly-owned and privately-owned utilities, in fact the opposite is true. In these sections, the Legislature has simply clarified that the Commission's previously-recognized jurisdiction with respect to only privately-owned facilities continues to apply.

We disagree with the Coalition in its argument that we can exert jurisdiction over publicly-owned municipal utilities by regulating the joint pole associations to which some municipal utilities belong. Joint pole associations are not public utilities, and therefore, are not subject to Commission jurisdiction as a separate entity. We do, however, have jurisdiction over those

members of joint pole associations which are investor-owned public utilities. By the same token, no new jurisdictional authority over municipal utilities is created merely because they also belong to a joint pole association. [8]

Therefore, while the Commission lacks authority over a publicly-owned public utility's provision of access to its support structures or ROW to a telecommunications carrier, the publicly-owned public utility must set just and reasonable terms for such access. A party that believes that the terms are not just and reasonable may pursue whatever remedies are available under laws directly governing publicly-owned public utilities. No remedy, however, appears to be available under federal law, which expressly exempts publicly-owned public utilities from the FCC's jurisdiction[9].

The obligations of a city, county or other political subdivision's to provide access to ROW under its control is addressed under Part 3 of the PU Code. The Legislature has expressly recognized the duties and responsibilities of a "municipal corporation", and the ability of a municipal corporation to retain or surrender control of some of its powers to the Commission. However, such powers do not include the power to supervise and regulate the relationship between such public utilities and the general public "in

[8] We believe, however, that the relationships between joint pole association members and their access agreements for pole attachments warrant further scrutiny within the framework of our jurisdiction over the various members of such associations. We shall direct the ALJ to solicit further comments concerning the implications of joint pole associations attachment agreements as they relate to nondiscriminatory access.

[9] Section 703(6) of the Act amended § 224 of the Communications Act of 1934 to require, among other things, that the poles, ducts, conduits and ROW owned or controlled by utilities are made available on reasonable terms and conditions to all telecommunications carriers. Section 224(a)(1), however, limits the definition of utility to investor-owned public utilities.

matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets." (Section 2906.)

In § 7901.1(a), the Legislature has further stated its intent for local governmental bodies not to abuse their discretion or to arbitrarily or unfairly deny requests for access, but that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." Under § 7901.1(b), the "control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner." Under § 7901.1(c), "[n]othing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities." Article XI, § 9 of the California Constitution expressly recognizes the authority of a city to prescribe regulations governing persons or corporations that provide public utility service.

Local governments may not arbitrarily deny requests for access to their rights of way by public utilities. The PU Code recognizes the rights of telecommunications carriers to obtain reasonable access to public lands and ROW to engage in necessary construction. PU Code § 7901 states:

> "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

Moreover, PU Code § 762 also authorizes this Commission to order the erection and to fix the site of facilities of a public utility where found necessary "to

promote the security or convenience of its employees or the public...to secure adequate service or facilities...." Accordingly, in situations where a local governmental body has denied ROW access to a telecommunications carrier, or demanded unreasonable terms of access which are tantamount to denial, we would have serious concern over compliance with the Code requirements. In any event, if a municipal body fails to discharge its duty regarding access requests, then an entity should be able to invoke any available administrative and civil remedies that govern allegedly unlawful actions by a local governmental agency. Alternatively, an entity may have a remedy under federal law. Section 253(c) of the Act expressly provides that nothing shall affect the authority of a local government to manage the public ROW or to require fair and reasonable compensation from telecommunications providers. . . for use of public ROW.[10] However, under § 253(d), the FCC may preempt a local government's regulation that prohibits or has the effect of prohibiting any entity from providing interstate or intrastate telecommunications service. That section nevertheless should be read in the context of amendments by the Act to federal law with respect to cable companies. In preempting franchising authorities from requiring cable companies to obtain franchises, Congress explained in the legislative history that "the conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively electric utility neutral way, manage its public rights-of-way and charge fair and reasonable fees." Preemption under § 253(d) would therefore

[10] Section 541(b), however, precludes a city from requiring a cable operator to pay franchise fees, when providing either cable or telecommunications services.

likely depend on whether the municipal corporation is in fact (in a given case) unduly discriminating against particular entities providing telecommunications services.

Likewise, we acknowledge parties concerns over ROW access difficulties with other state agencies such as CalTrans. We shall seek to promote greater awareness by CalTrans of the importance of CLCs' accessibility to essential state-controlled ROW in the interests of California's legislative mandate to promote the development of a competitive telecommunications market and that CLC's are telephone corporations with all the rights of the incumbent LECs. To that end, we shall serve a copy of this order on CalTrans.

## F. Reciprocity of Rights-of-Way Access Between Incumbents and CLCs

### 1. Parties' Positions

As amended by the Act, 47 U.S.C. § 224(f)(1), requires a utility to grant telecommunications carrier and cable operators nondiscriminatory access to all poles, ducts, conduits, and ROW owned or controlled by the utility. A utility's rights under § 224(f)(1), however, do not extend to ILECs. ILECs are excluded from the definition of "telecommunications carriers" under 47 U.S.C. § 224(a)(5) which "operates to preclude the incumbent LEC from obtaining access to the facilities of other LECs." FCC Interconnection Order 1, ¶ 1157. The Coalition argues that therefore, under the Act, ILECs do not have a reciprocal right of access to the ROW and support structures of the CLCs, and that the Commission should adopt the same policy in interpreting California PU Code § 767. The Coalition claims that an ILEC's requests for reciprocal access rights could be the product of anticompetitive motives, made solely to disrupt the operations of a new market entrant that may not have the same range of alternative facilities as an incumbent utility has. Until the date when CLCs have

extensive ROW and support structures of their own, the Coalition argues that the Commission should not require a reciprocal access policy.

Pacific contends that this exclusion could lead to irrational and unfair results, and that the Commission should continue to require reciprocal access in California. Under both federal and state law, investor-owned electric utility are required to provide access to their facilities. Section 224, however, excludes the ILEC from the definition of "telecommunications carrier," and therefore permits an electric utility to unilaterally deny access to the ILEC, or charge unreasonable rates. Pacific views this policy as illogical and inequitable, and asks the Commission to continue to require all utilities to provide access under reasonable terms and conditions.

Pacific argues that reciprocal access among all utilities has long been required in California under PU Code § 767. Section 767 provides that, if public convenience and necessity requires the use of the conduits and other facilities of one public utility by another public utility, the Commission may order it and establish reasonable compensation.

GTEC disagrees with the Coalition's interpretation of Section 224(a)(5) of the Act. While Section 224(a)(5) excludes ILECs from the definition of a telecommunications carrier for purposes of this Section, GTEC argues, this simply means that the nondiscrimination provision does not apply to ILECs. GTEC does not interpret it to mean that ILECs can completely be denied access to CLC facilities and ROW, for this would be at odds with the requirements of Section 251(b)(4).

GTEC notes that Section 251(b)(4) states that <u>all</u> LECs, not merely incumbent LECs, have the duty to afford access to the poles, ducts, conduits, and ROW of such carriers to competing providers of

telecommunications service on rates, terms, and conditions that are consistent with Section 224.

#### 2. Discussion

As a practical matter, we expect that CLCs will need access to the support structures and ROW of incumbent utilities on a much greater scale than incumbents will need access to CLC facilities. Nonetheless, the general provisions of PU Code § 767 relating to reciprocal access of utility support structures and ROW apply to all public utilities, independently of any reciprocal requirements under the Act. Consistent with the requirements of PU Code § 767, a CLC may not arbitrarily deny an ILEC's request for access to its facilities or engage in discrimination among carriers. We believe that the rules for access which we adopt herein should be applied evenhandedly among all public utilities, and shall make our ROW access rules reciprocal. Nonetheless, we expect any such requests for access by an incumbent utility to be made in good faith, and to take into account the limited resources of new CLCs to accommodate requests for access to their own facilities.

## IV. Pricing Issues

### A. Parties' Positions

Parties disagree concerning the manner in which prices for third-party attachments to facilities of utilities should be determined. Pricing includes (1) the one-time charge for any necessary rearrangement of facilities performed by the utility to accommodate the additional attachment of the requesting telecommunications carrier and (2) an annual recurring fee for the cost of providing the ongoing attachment to poles, supporting anchors, or other support structures of the utility. In addition, utilities may also charge for their out-of-pocket costs associated with any preliminary investigation done by the

utility to respond to third-party requests concerning the availability of space for an attachment. Parties generally agree on the pricing for the one-time costs of rearrangements based on actual out-pocket expenses incurred. Parties' pricing disputes focus principally on the proper basis for the pricing of the annual recurring charge for attachment to poles and other support structures of the utility.

The Coalition argues that attachments to poles, anchors, and other support structures for telecommunications services should be priced on the basis of historic or embedded costs of the utility less accumulated depreciation, under the same formula as is required for cable services under PU Code § 767.5(c)(2) in order to ensure nondiscriminatory treatment among all telecommunications carrier.

PU Code § 767 (which generally covers all public utilities) prescribes no specific formula for fixing the annual recurring fee for pole attachments for telecommunications services such as is found in PU Code § 767.5(c)(2) (which covers only cable corporations). Section 767 generally authorizes the Commission only to "prescribe a reasonable compensation and reasonable terms and conditions for the joint use" of facilities in the event parties fail to negotiate an agreement. The Coalition believes, however, that there is no legislative prohibition on the Commission's adopting the cable television formula (when it acts pursuant to § 767) for fixing the rate for pole attachments generally by all telecommunications carriers. Moreover, the Coalition argues that such an approach is mandated by nondiscrimination principles. Since the Commission cannot, by statute, vary from the pricing formula set forth in PU Code

§ 767.5(c)(2)[11] when it sets pole attachment rates applicable to cable television systems, the Coalition argues that all telecommunications carriers, including those that are not cable operators, must be given the same nondiscriminatory rate treatment. The Coalition claims that access to utility support structures and ROW for telecommunications carriers must therefore be set at the same rates, and on the same terms and conditions, as are afforded to cable companies pursuant to PU Code § 767.5. The Coalition claims that competition would be severely skewed if one type of telecommunications provider, (*i.e.* cable companies or their affiliates acting as telecommunications carrier) enjoyed access to utility ROW and support structures on more favorable rates, terms, and conditions than other telecommunications carriers.

The Coalition denies that any clear distinctions can be made between the services of a cable provider which are considered cable-only versus those which are considered telecommunications. The Coalition argues that cable

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[11] Under Section 767.5(c)(2), the annual recurring fee is computed as follows:

i. For each pole and supporting anchor actually used by cable television operator, the annual fee shall be two dollars and fifty cents ($2.50) or 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor, whichever is greater, except that if a public utility applies for establishment of a fee in excess of two dollars and fifty cents ($2.50) under this rule, the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor.

ii. For support structures used by the cable television operator, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the telecommunications carrier's equipment by the total usable volume or capacity. As used in this paragraph, "total usable volume or capacity" means all volume or capacity in which the public utility's line , plant, or system could legally be located, including the volume or capacity rendered unusable by the telecommunications carrier's equipment.

operators are rapidly expanding their use of coaxial cables, optical fibers and other facilities attached to utility structures to offer both telecommunications and traditional cable (video) services. The Coalition claims that cable operators (or their telecommunications carrier affiliates) already are or soon will be using their pole attachment rights, originally obtained for the purpose of disseminating cable television programming, for provision of competitive telecommunications services. Therefore, the Coalition does not believe it is valid to charge cable television operators different rates for pole attachments depending on what services they offer.

Pacific objects to the use of the statutory formula in § 767.5 for pricing of telecommunications carrier pole attachments and believes that the Commission is under no obligation to apply the statutory formula for cable television services to all attachments by telecommunications carrier in order to ensure nondiscriminatory access. Pacific claims that § 224(e)(1) of the Act prescribes a different pricing formula to be used to develop rates for attachments by telecommunications carrier and cable companies providing telecommunication services than the one currently used for cable-only attachments.

Pacific proposes that any pricing methodology prescribed by the Commission should permit use of forward-looking costs, consistent with the methodology approved for pricing Pacific's other services in the Open Access and Network Architectural Development (OANAD) proceeding. Pacific has used Total Service Long Run Incremental Cost (TSLRIC) to cost the ROW and support structures within its own retail services, and argues that access to ROW and support structures by telecommunications carrier should be priced to at least recover TSLRIC. Pacific proposes that the Commission consider using the

formula found in §§ 224(e)(2)and (3) of the Act, which requires attaching parties to pay their share of the costs of the common portion of any support structures.

GTEC argues that the current rate for CT attachments has no applicability to CLCs generally, and that its current tariffed access rate of $2.92 for CT attachments is below cost and cannot be sustained for CLCs. GTEC believes this cable access rate was established solely for CT service prior to the entry of CLCs to reflect policy concerns of an earlier era to foster CT attachment and correspondingly, the viability of that industry. GTEC states that once its cost studies are adjudicated through an arbitration, nondiscriminatory treatment of carriers will result in a uniform rate for pole attachment for all carriers. It is only the make-ready costs, which must take into account the specific circumstances of poles and the surrounding terrain, which will vary depending on the particular poles to which a carrier desires to attach.

GTEC notes that in the past, Pacific has negotiated attachment rates with CT and other carriers, resulting in a rate that was several dollars higher than GTEC's rate. Section 252(a) of the Act provides for such negotiation of attachment and access rates, and GTEC states that it is currently in the course of such negotiations with several carriers. Under § 252(b), if parties are unable to agree to a rate, then the Commission may determine the rate through arbitration. GTEC proposes that the rental rates for pole and conduit/duct space should be based on TSLRIC plus a contribution to common costs. All other charges for provision of space (e.g. make-ready, audits, field surveys, record check, telecommunications carrier.) should be reimbursed by the requesting CLC based on the actual labor and material costs incurred, according to GTEC.

Edison believes that the pricing of access should be market-based as determined through negotiations between the parties. As long as the utility's cost structure can support a negotiated rate lower than the cost for the carrier to

construct an alternate path, Edison argues, both will have an incentive to negotiate a mutually agreeable access price. In those instances where the market is unable to support a negotiated rate greater than or equal to the utility's cost, Edison proposes that the utility's after-tax cost should become the price. Edison argues that a floor price of the utility's after-tax cost will protect the utility from subsidizing the communications industry. Edison believes utilities should recover the fully allocated costs associated with permitting, implementing, and maintaining attachments, and costs associated with facility modification or make-ready work. In some cases, there are also subsequent costs incurred due to temporary or permanent relocation of third party facilities as a result of mandatory reconfigurations of the electric utility system to meet safety and reliability needs or changing rules and regulations. Edison believes the costs of these necessary activities should be borne entirely by the parties seeking access to the facilities. Edison also argues that the utility should be allowed to contractually require telecommunications carrier (and their contractors or sub-contractors) to maintain appropriate insurance and to indemnify the utility from all costs due to damage or injury to persons or property resulting from the carriers' installation, maintenance or operation of telecommunications equipment.

PG&E likewise argues that the CT formula fails to provide fair and just compensation for telecommunications carrier' access to its distribution poles.[12] PG&E opposes the use of historic embedded cost pricing, arguing that it

[12] Since its current effective CT attachment rate was established in a contract which was developed more than ten years ago, PG&E argues that the present rate would need to be updated to determine what the § 767.5 formula would produce based on current data.

does not recognize the utility's ongoing financial obligation to keep the distribution poles fit for service. PG&E advocates the use of market-based pricing through negotiation, but believes that principles such as replacement cost new less depreciation should be incorporated into the development of distribution pole pricing if market-based pricing is not allowed. At a minimum, PG&E seeks to recover fully allocated costs for the use of its ROW support structures. Anything less would raise serious constitutional questions, in PG&E's view, including the taking of property without just compensation.

### B. Discussion

Parties are in general agreement that the utilities should be allowed to recover their actual costs for make-ready rearrangements performed at the request of a telecommunications carrier, and their actual costs for preparation of maps, drawings, and plans for attachment to or use of support structures. We recognize that such types of costs are specific to the demands of a particular attachment and cannot be set at any standard rate. We shall therefore prescribe that telecommunications carrier reimburse the utility for such costs based on actual expenses incurred.

By contrast, the basic cost of attachment per pole or per linear foot of conduit usage are examples of charges which can be more readily standardized based upon the costs of each incumbent utility. We shall prescribe standards for the pricing of overhead pole and underground conduit as set forth below. As previously noted, we will not require the tariffing of these charges. Our prescribed standards are not intended to create a disincentive for parties to negotiate their own arrangements tailored to individual circumstances, but rather are intended to provide default prices and terms in the event parties fail to reach agreement. For example, a carrier may agree to pay a higher attachment

rate if acceptable concessions are made in the other terms and conditions offered through negotiations.

The parties' principal controversy over pricing centers around the rates which should be charged for attachments to poles and other support structures. The beginning point for resolving the dispute over pricing principles applicable to utility pole attachments and support structures is to identify the underlying rights, interests, and obligations of the respective parties. The incumbent utilities have a right to be fairly compensated for the use of their property. Their interest is in obtaining the most favorable rates and terms possible in order to maximize the wealth of the firm. Their obligation is to provide access to their poles and support structures at reasonable terms and prices.

The CLCs have a right to obtain access to utility poles and support structures at reasonable terms and prices which do not impose a barrier to competition. Within the bounds of what may be considered fair terms, the incumbents will seek the highest prices and the CLCs will seek to pay as little as possible. In a competitive market setting, the relative bargaining between a willing buyer and willing seller produces a market clearing price which is acceptable to both sides. We must therefore consider whether the relative bargaining power of the incumbent utilities is balanced in relation to CLCs. We conclude, that by virtue of their incumbent status and control over essential ROW and bottleneck facilities, the local exchange carriers (LECs) and electric utilities have a significant bargaining advantage in comparison to the CLC with respect to ROW access. While theoretically, the CLC could seek an alternative to attachment to utility support structures, the practical alternatives are frequently limited or cost prohibitive. For example, municipalities often resist the installation of any additional utility poles on public streets. The municipalities

also are often unreceptive to repeated reopening of street surfaces for installation of new conduit systems. In such instances, CLCs would be forced to deal with the incumbent utilities for access to the utility's facilities and would not be readily able to seek an alternative if the incumbent proposed unreasonable terms.

Once facilities-based competition becomes more established, the ROW infrastructure might evolve to where the present incumbent utilities will not be in control of bottleneck facilities. Yet, since we are only in the nascent stages of facilities-based competition, a truly competitive market for providing alternative means of access to support structures for CLCs does not yet exist. Therefore, we cannot presently rely exclusively on the negotiation process to necessarily produce reasonable prices for ROW access. Given the inherent bargaining advantage of incumbents, the next question is what pricing basis will promote a more competitively electric utility neutral telecommunications carrier.

The Coalition has claimed that attachment rates for poles and other support structures charged to telecommunications carriers must be priced on the same basis as is required for cable providers under PU Code § 767.5(c)(2) to avoid unlawful discrimination between the cable providers offering telecommunications services and other telephone corporations which do not own nor are affiliated with a cable system. Given the continuing advances in the technological capabilities of cable providers to offer a wide array of both one-way and two-way communications services over their facilities, the Coalition claims it has become increasingly difficult to clearly delineate a cable provider as offering only "cable video" service as opposed to "telecommunications" services.

We disagree with the Coalition's and CCTA's interpretation that the exact pole attachment pricing formula of § 767.5(c) applicable to cable operators must be extended to all providers of telecommunications services in order to

prevent unfair price discrimination. The principle of nondiscriminatory pricing is required under the provisions of the Act. Therefore, in considering whether a pricing method is unfairly discriminatory, it is appropriate to observe how the Act treats cable operators in relation to telecommunications carriers. In reference to applicable rates for pole attachments, § 224(d)(3) of the Act states that:

> "This subsection shall apply to any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service."

Under Subsection 224(e), the FCC is to prescribe new regulations within two years after enactment of the Act for pole attachments for carriers offering telecommunications services. These new regulations, however, would not apply to pole attachments used by cable operators exclusively offering cable television service. Therefore, § 224(d) and (e) of the Act explicitly provide that different rate provisions can apply to cable operators depending on whether they offer cable television service exclusively or whether they also offer telecommunications services.

Consistent with the Act's distinction between cable and telecommunications services, it is not discriminatory to apply different rates for pole attachments dependent on whether the attachment is used to offer telecommunications services. Cable television providers that use pole attachments to also provide telecommunications services are treated in the same manner as any other provider of telecommunications services, and there is no unfair discrimination. Thus, we conclude that pole attachment rates charged to cable providers offering telecommunications services are not governed by PU

Code § 767.5(c). The pricing formula in PU Code § 767.5(c) is applicable only to cable television providers that do not also offer telecommunications services. This limitation on the applicability of prices under the statute to cable television services is consistent with PU Code § 215.5 which defines a "cable television corporation" as "any corporation or firm which transmits television programs by cable to subscribers for a fee."

If a cable provider that previously contracted for pole attachments only for the purpose of offering cable video service, now uses its pole attachment to offer telecommunications services, that cable provider becomes responsible for payment of pole attachment rates applicable to a telecommunications carrier. We recognize that disputes can arise as to whether a cable operator is using a particular pole attachment to provide telecommunications services as opposed to cable television or other specialized cable services other than telecommunications service. We shall solicit parties' comments on what practical means can be established to minimize disputes of this nature, and to enforce the proper rates for pole attachments as provided for in pole attachment agreements. One way to reduce such disputes would be to use a similar methodology to establish both rates.

Since the § 767.5(c) formula does not by law encompass telecommunications services, we must determine what alternative pricing for telecommunications services is appropriate. There are two basic variables involved in the pricing determination for pole and support-structure attachments: (1) the percentage of space for which the attaching party is to be charged; and (2) the cost of the pole or support structure. Under the Coalition's pricing proposal, the charge for pole attachments would be limited to no more than 7.4% of the utility's cost of ownership of the pole, as prescribed by § 767.5(c) for cable attachments. We have already concluded there is no legal requirement

to apply this percentage to pole attachments for telecommunications services. Likewise, we find no economic rationale to necessarily assume the 7.4% allocation accurately reflects a reasonable cost allocation factor for a utility pole attachment used for telecommunications service. The 7.4% allocation may bear little or no discernible relationship to the actual space associated with providing a pole attachment.

Under § 224(d) and (e) of the Act, the attachment rate is to be based on the percentage of usable space or duct capacity occupied by the attachment of each entity. We shall adopt these general provisions in our Appendix A rules. We still need to determine what percentage allocation is appropriate to realistically reflect the usage of pole space and support structure capacity by parties making attachments. As discussed below, we shall solicit further comments from parties regarding the development of standardized allocation factors for purposes of determining the percentage of pole and support structure costs to apply in determining rates for pole and support structure attachments.

The second element of the pricing formula relates to the assumptions regarding the total cost of the attachment. The parties disagree over what cost basis should be used for compensation of capital costs related to pole and support structure attachments. The Coalition advocates the use of historical embedded capital costs net of depreciation for computing total cost while Pacific and GTEC advocate the use of long run incremental costs. While we have recognized the relevance of incremental costs in certain settings, we believe that the use of embedded cost as a pricing basis is more conducive to the development of competitive market than the use of incremental costs.

In the pricing of unbundled network elements (UNE) in the OANAD proceeding, we have directed that incremental costs rather than embedded costs be used for purposes of determining price floors. The use of

incremental costs for deriving price floors is appropriate to guard against predatory pricing for competitive services. By contrast, the alternatives available to telecommunications carrier for pole attachments is largely limited to the incumbent utilities, and there are frequently few, if any, competitive alternatives available for attachments. Therefore, the economic rationale for using incremental cost pricing is not particularly compelling in the case of utility poles and support structures.

We conclude that the principle of embedded cost pricing has more validity in the context of pole attachments for telecommunications carrier. We have historically used embedded costs for the pricing of utility services which are subject to a captive market. While carriers are not exclusively dependent on the incumbent utilities for meeting their access needs, it may be impractical or unduly expensive to seek some alternative source of access. As noted previously, local governments are likely to be unreceptive to requests to install new utility poles or to repeatedly open street surfaces. We therefore conclude that embedded cost pricing provides a reasonable basis for the pricing of access to utility poles and support structures.

For facilities where incremental costs are declining, the use of incremental cost pricing will result in lower prices compared to the use of embedded cost. In the case of utility pole attachments, however, embedded costs are lower than incremental costs due to the fact that many of the poles were installed decades ago and have largely been depreciated for accounting purposes over time. Therefore, embedded costs would produce lower pole attachment rates and would be more affordable than would rates priced to recover incremental costs. If incumbent utilities were free to charge incremental-cost-based rates or to impose even higher profit markups based on their bargaining leverage, they would be able to extract excessive economic rents

associated with these highly depreciated assets while forcing the CLCs to pay prohibitive rates which may impede their ability to compete. The use of embedded cost will therefore yield more affordable pole and support structure attachment rates, and thereby promote the emergence of a competitive local exchange market.

In some cases, pole attachment rates for cable service are based on contracts which were originally negotiated over 10 years ago. The prices, terms, and conditions in those contracts were based on circumstances in existence at the time of the negotiations. Accordingly, while we shall adopt the embedded cost standard as a basis for pricing of pole, conduit, and support structure attachments, prices should be computed using updated cost data. We shall provide an opportunity for parties to comment within 60 days of this decision on the most expeditious way to develop updated embedded cost and operating cost data for the utility poles and support structures of the incumbent LECs and electric utilities from which attachment rates can be determined. The use of updated data reflecting current embedded costs will reasonably compensate the incumbent utilities for providing access even though it will result in a lower cost to CLCs than the pricing approach proposed by the ILECs and electric utilities. The embedded cost formula applies to capital costs, net of accumulated depreciation, and also allows for recovery of the annual operating expenses of the utility's poles and support structures. An updated allowance for operating expenses will therefore reasonably compensate incumbent utilities for their ongoing operating expenses related to its support structures.

While the embedded cost approach will not generate as much revenues for incumbents as would alternative pricing formulas, the use of embedded-cost pricing is not confiscatory nor does it subsidize CLCs. A price based on currently updated embedded updated costs reasonably compensates

the utility for the provision of ROW access. As previously found by the courts, "[r]ates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base." (FPC v. Hope Natural Gas Co. (1944) 320 U. S. 591.) Also, it is our purpose as a regulator of public utilities to protect the public from monopolistic pricing by utilities.

The pricing standards we prescribe under our rules should only be triggered, however, in cases where the respective parties fail to negotiate a mutually agreeable pole attachment rate on their own. Parties shall be free to negotiate pole attachment rates which deviate from the standards prescribed under our rules. However, if they are unable to reach agreement and submit the dispute to the Commission for resolution, we shall apply the rate standards in our rules as the default rate, based upon historical embedded costs, and straight-line depreciation accounting consistent with our findings in C.97-03-019 (CCTA vs. SCE.)

## V. Obligations to Respond to Requests Concerning Facility Availability and Requests for Access

### A. Parties' Positions

The parties are in dispute over how quickly the incumbent utility should respond (1) to initial inquiries from CLCs concerning the availability of space for attachments and (2) to follow-up requests seeking specific attachments.

The Coalition believes that standard time frames should be imposed for requiring ILECs and electric utilities to provide responses to a CLC inquiring about the availability of conduit or poles. The Coalition proposes that the time frames which were previously incorporated into an agreement between Pacific and AT&T should be applied as a general rule for all parties. Under the terms of

this agreement, the ILEC or electric utility would provide information regarding the availability of conduit or poles within 10 business days of receiving a written request. And within 20 business days, if a field-based survey of availability is required.

If the written request sought information about the availability of more than five miles of conduit, or more than 500 poles, the incumbent utility would (1) provide an initial response within 10 business days; (2) use reasonable best efforts to complete its response within 30 business days; and (3) if the parties were unable to agree upon a longer time period for response, the incumbent utility would hire outside contractors, at the expense of the requesting party. Before proceeding with such outside hiring, however, the incumbent utility would notify the requesting party of the contractor's expected charge. If the incumbent utility provided an affirmative response to the request for space, access would essentially be granted immediately. If, however, "make-ready work" [13] were necessary, the incumbent utility would complete the make-ready work at a reasonable cost, generally within 30 business days. If a longer time period were required, the parties could either agree upon such longer period, or, failing that, the outside contractors would be hired by the requesting party at its expense.

The Coalition believes that the time allotted to an incumbent utility for granting access to a CLC should not exceed 45 calendar days (alternatively, 30 business days). The Coalition proposes that make-ready work be required to

[13] "Make-ready work" is the work required (generally rearrangement and / or transfers of existing facilities) to accommodate the facilities of the party requesting space. This work may be performed by the owner of the facility or by the requesting party through approved contractors.

commence within no more than 15 days after a utility has determined that additional attachments can be accommodated through rearrangements of existing facilities, and to be completed within 30 days, absent special circumstances. Where unusually extensive make-ready work is required, the Coalition believes that the attaching and utility parties should be able to agree on an appropriate period for completing all make-ready work, not to exceed 60 days unless parties agree otherwise. If the attaching-party and utility-party could not agree on the amount of time or cost required for make-ready work, the attaching-party would be allowed to use a qualified third-party contractor to do the make-ready work, subject to utility supervision, if the attaching-party is satisfied with the contractor's estimates of the time required and the cost of the project.

Pacific is willing to provide information for general planning purposes, but believes the amount of information requested at one time should be limited. In most cases, Pacific believes it would be an inefficient use of resources to require responses within 10 or 20 days for general requests for information. Moreover, in some cases the information is also available from public sources such as the County Assessor's office. Pacific seeks flexibility to negotiate a reasonable response time with each requesting party on a case-by-case basis, and expresses concern about its ability to comply with rigid response time frames in light of the possibility of simultaneous requests by multiple parties.

GTEC believes that no particular time period should be established for responding to a request because the amount of time required to respond to an applicant's inquiry will vary widely based on numerous factors. As an alternative to a set response time for all requests, GTEC proposes to provide the requesting carrier with a status report as to the availability, if certain information

cannot be supplied in less than 45 days, with completion of the request or further status update within 15 days thereafter. To facilitate a shortened-response time, GTEC states that a CLC's request should be framed to generate information for a specific point-to-point location, rather than general requests.

Depending on the required amount of "make-ready" and rearrangement work, GTEC believes that 30-to-60 additional days may be required after availability is confirmed for releasing the requested space to a CLC so that it may install its facilities. GTEC does not believe that response times should be differentiated based merely on whether a project involves more than five miles or 500 poles, but that other factors, such as the placement of poles on private or inaccessible property, may be much more significant in determining the time required for review. If space is available, no make-ready work is required, and the requesting CLC is next on the first-come-first-served list for the space in question, then GTEC agrees to grant access immediately.

GTEC states that the requesting CLC should also complete a "Pole Attachment Request and/or a Conduit Occupancy Request" in order to establish the CLC on a first-come-first-served list for the facilities in question. CLCs and GTEC would need to negotiate an agreement specifying the terms and conditions of the pole attachment or conduit occupancy. Once an agreement is entered into, its terms and conditions would automatically apply to all future requests, unless otherwise agreed.

PG&E recommends that the Commission not adopt any specific time limit for responding to an applicant's request for information about space availability, because of the diversity of requests involved. PG&E proposes that a request for access not be deemed made until the telecommunications carrier has provided a specific request, identifying each support structure it wishes to connect to and providing complete field information for the structure and

accurate, complete engineering studies for the telecommunications facilities on the structure, including windloading, vertical loading and bending moment. PG&E argues that the utility not be obligated to respond to the request for access until the telecommunications carrier has made advance payment for the utility's engineering work.

PG&E sees no reason to burden an electric utility with requirements to respond to general requests for information by telecommunications carrier. PG&E believes telecommunication requests should in no case be given priority ahead of other types of essential electric utility work or governmental work such as municipal street widening projects.

Based upon their experience in processing access requests, Edison and SDG&E claim the utility needs at least 45 days to review drawings and specifications and complete a field survey to determine space availability. If the utility must also determine if existing property rights are sufficient to permit third-party access (which sometimes involves locating records a century old), Edison and SDG&E argue that the utility needs additional time for review, with the flexibility to extend the processing time if an emergency condition exists, if the request is unusually large or complex, or if the volume of requests exceeds normal workload levels. Edison and SDG&E also oppose a requirement that all make-ready work be completed within 30 days of an access request, arguing that the amount of work to be done to make facilities ready will vary depending on the type, location, and number of affected facilities.

### B. Discussion

We agree that, given the varying degrees of complexity and geographic coverage involved in requests for information, there is no single standard length of time for responses which will fit all situations. The rigid

enforcement of response times which bear no relationship to the scope or complexity of a given request could impose unreasonable burdens or inefficient use of resources on the incumbent utility. On the other hand, if no standard for response times is imposed, there will be little incentive for incumbent utilities to provide timely information. The CLC could be faced with unreasonable delays in receiving information if the utility's response time obligations were open-ended, and there were no performance standards against which to hold the utility responsible. Such delay could impede the ability of the CLC to enter the market or expand its operations to compete efficiently

Given our findings above that the incumbent utilities hold an inherent advantage in negotiations, we shall, therefore, adopt standards for response times to be used as guidelines in negotiations. While the incumbent utilities objected to setting standard deadlines for responding to requests for information, the adoption of such guidelines will help to promote greater parity in the bargaining power of CLCs relative to incumbents. The incumbent utility's response time shall be considered presumptively reasonable if it falls within the adopted standard. In recognition of the diversity in the nature and scope of individual requests, however, parties will be expected to use their own discretion to negotiate longer or shorter response times tailored to the complexity and volume of data involved in a given request. As a preliminary step in preparing an initial inquiry regarding the availability of space, the CLC should meet and confer with the incumbent utility to help clarify and focus the scope of the request in order to make the most efficient use of the incumbent's time and resources in responding to the request. In some cases, a CLC may find it more efficient to obtain certain information from public sources instead of relying on the incumbent utility. In the event that parties are unable to agree on the terms for response time for information requested of the utility, they may bring the

dispute before the Commission using the dispute resolution procedure outlined below. The incumbent utility shall have the burden of proving in such disputes why it cannot meet the standard response time guideline, and of showing what time frame for a response is appropriate. It shall not be sufficient for the incumbent utility merely to argue for an open-ended period to respond, with no established deadline.

In setting a deadline for responding to CLC general requests for information concerning ROW access, we shall adopt as guidelines the time frames proposed by the Coalition and CCTA. The Coalition's and CCTA's proposed time frames reflect the actual time frames which were mutually agreed to by Pacific and AT&T as reasonable and workable between themselves. We find no reason why these time frames should not be applied generally. These proposed time frames shall be adopted as general guidelines applicable to all ILECs as well as electric utilities. We find no basis to exclude electric utilities from the obligation to respond to requests for information from telecommunications carrier, as requested by PG&E. We agree, however, that the electric utility should not compromise its primary obligations to serve its own customers in the process of complying with a telecommunications carrier request for information or for ROW access. In the event carriers cannot agree to a response date and the dispute is submitted to the Commission for resolution, the burden shall be on the electric utility to identify any alleged essential utility work which it claims as the cause of its delay in responding and to justify the additional time it claims is needed to accommodate the essential utility work.

The incumbent utility's guideline for response time for initial requests concerning availability of space shall not exceed 10 business days if no field survey is required, and shall not exceed 20 business days if a field-based survey of support structures is required. In the event that more than 500 poles or

5 miles of conduit are involved, the response time shall be subject to the negotiations of the carriers involved. We recognize that there may be situations involving fewer than 500 poles or 5 miles of conduit which still involve considerable complexity and require more time than provided for in the adopted guidelines. We expect parties to take into account the time and complexity involved in negotiating response times. In the event parties cannot agree and submit the matter to the Commission for resolution, the burden shall be on the incumbent utility to justify any extra time claimed to be needed for a response.

In the event that a telecommunications carrier decides after the initial response concerning availability that it wishes to use the incumbent utility's space, the telecommunications carrier must so notify the incumbent in writing. The telecommunications carrier must provide sufficient detail to identify each support structure to which it wishes to connect. In order to finalize its written request, the telecommunications carrier should contact the incumbent utility to arrange for completion of any necessary preliminary engineering studies for the telecommunications facilities on the structure, including windloading, vertical loading, and bending moment. The incumbent utility will be required to respond to the telecommunications carrier within 45 days after receipt of the written request, with a list of the rearrangements or changes required to accommodate the carrier's facilities, and an estimate of the utility's portion of the rearrangements or changes. The telecommunications carrier shall also pay for the costs of required engineering studies. For requests for access involving more than 500 poles or 5 miles of conduit, or where parties agree that the scope and complexity warrant longer deadlines, we shall expect the parties to negotiate mutually agreeable alternative response times.

These guidelines for response times are not intended to preclude the carriers from exercising flexibility in negotiations to tailor the time frames for

providing requested information and confirming availability of access to the specific demands of each situation. Rather, the purpose of the guidelines is to discipline the negotiation process and promote more equal bargaining strength between incumbent utilities and CLCs. In the event of a dispute brought to us for resolution, we shall consider these guidelines presumptively reasonable. We may consider modifying or refining these adopted response time guidelines at a later date if subsequent experience of negotiations or resolved disputes provide a basis to do so.

## VI. Treatment of Confidential Information

### A. Parties' Positions

The Coalition seeks a rule prohibiting both ILECs and incumbent electric utilities from disclosing CLCs' requests for information and requests for access to their ROW and support structures. The Coalition argues such information should be available only to persons with an actual, verifiable "need to know" for the purposes of responding to such requests, and proposes that violation of such regulations should be visited with harsh sanctions by the Commission, accompanied by findings of fact that violation of such regulations by ILECs are a breach of the duty to fulfill the requirements of §§ 251(b) and 251 (c) of the Act, to negotiate for interconnection, in good faith.

The Coalition proposes use of a standard nondisclosure agreement to protect the confidentiality of requests for information concerning the availability of space on utility support structures, or requests for access to available space, as well as any maps, plans, drawings or other information that discloses a competitor's plans for where it intends to compete against incumbent utilities.

Pacific objects to the Coalition's proposed treatment of the CLC's confidential information as overly broad and one-sided with no reciprocal duty not to disclose the utility's proprietary information. Pacific believes in most cases, a request for access should not be considered proprietary, and a utility should not be required to erect the "Great Wall of China" around employees responsible for responding to requests for access.

Pacific proposed measures to protect the confidentiality of its own information, requiring the party requesting competitively sensitive information to sign a nondisclosure agreement. Pacific believes the party providing the information should have the right to redact any information that is non-vital to the requesting party. Edison asserts that its pole data and inventory maps are confidential and competitively sensitive, and that utilities should be permitted to require telecommunications carrier to execute the utility's nondisclosure agreements before receiving competitively sensitive pole data and mapping information.

### B. Discussion

We recognize that various sorts of data exchanged between parties in negotiating access rights may contain commercially sensitive information, and each party should be permitted to request that certain data be kept confidential. As competition for telecommunications services becomes more pervasive, the need to protect commercially sensitive information from competitors may become more of an issue. The standard for protection of confidential data should not be one-sided, but should equally apply to CLCs, incumbent utilities, and any other party to an access agreement. The dissemination of information which a party has identified as commercially sensitive should be subject to reciprocal protective orders and limited only to those persons who need the information in

order to respond to or process an inquiry concerning access. Parties providing confidential information should be permitted to redact nonessential data and require that nondisclosure agreements be signed by those individuals who are provided access to such materials.

## VII. Restrictions on Access to Utility Capacity

### A. Safety and Reliability Issues

#### 1. Parties' Positions

Parties expressed differing views concerning the extent to which an incumbent utility may deny or limit access to its facilities based on safety and reliability considerations. Parties generally agree that the facilities of EUs pose greater and more complex safety concerns that those of the ILECs.

Edison and SDG&E seek the discretion to refuse or limit all carriers' access to facilities where, in the utility's best judgment, access would create safety concerns or pose a risk to the electric system's reliability or stability. In particular, Edison and SDG&E seek to categorically exempt facilities that are in direct proximity to primary energized voltage conductors from any mandatory access requirements,[14] arguing that the potential harm to worker safety, public safety and system reliability outweigh the benefit of access to these facilities.

PG&E argues that the Commission's rules need to distinguish between nondiscriminatory access to telecommunications facilities as opposed to electric utility facilities to avoid detrimental consequences to a safe, reliable, and efficient electric system. EUs are in a completely different business which

[14] Primary energized voltage conductors "are electric distribution conductors that are energized at 600 volts or greater."

requires different technical, engineering, and safety standards from telecommunications.

PG&E seeks to preserve the option of EUs to deny telecommunications carrier access based on safety, reliability, and other reasonable terms. PG&E argues that applicable GO rules need to be strictly followed, especially for underground installations, to protect the safety of its work force and the reliable and safe installation, operation and repair/replacement of power cables. The reliability of PG&E's transmission facilities is further governed by the Western Systems Coordinating Council operating guidelines which prescribe how PG&E will operate its transmission facilities to maintain the reliability of the Western regional United States transmission grid system. Once an independent system operator assumes operational control of PG&E's transmission system, additional requirements above and beyond GOs 95 and 128 may be established. PG&E further argues that differences in legal and regulatory requirements may raise issues which are unique to EUs. For example, Electric Tariff Rules 15 and 16 govern electric line and service extensions, while PU Code § 783 places procedural requirements on changes to line extension rules. PG&E also argues that any rules adopted providing for access to electric distribution facilities should not be allowed to create conflicts with electric industry restructuring.

Edison argues that no third party should install or modify an attachment without providing prior notice to, and receiving approval from, the utility. For instance, changing the size or type of any attachment, or increasing the size or amount of cable support by an attachment (including overlashing existing cable with fiber optic cable) has safety and reliability implications that the utility must evaluate before work begins. Edison and SDG&E argue that the telecommunication providers should comply with at least the same safety

practices as trained and experienced electric utility workers when working on an electric utility facilities or ROW to avoid exposing the public to grave danger and potentially fatal injuries. Further, Edison believes that utilities must receive advance notice and supervise all facility installations and modifications to ensure adherence to appropriate design and safety standards.

Edison believes that Commission GO 95 and the provision of the California Office of Occupational Safety and Health Administration (CAL-OSHA) Title 8 adequately address the safety issues that arise from third-party access to the utility's overhead distribution facilities. GO 95 prescribes uniform requirements for overhead electrical line construction to ensure safety of workers and the general public as well as reliability. Edison expresses reservations, however, about allowing telecommunications carrier access to underground electrical facilities without strictly-observed notification and utility supervision requirements that supplement GO 128 and CAL-OSHA Title 8, because of the confined space in underground electric facilities (e.g., underground vaults) and the associated increased safety concerns. GO 128 requires separation between the underground facilities of telecommunications carriers and those of EUs, and prohibits the collocation of TCs' facilities in the conduit systems of EUs except under certain specific conditions. Edison states that each utility has developed unique operating practices tailored to the type of electric equipment contained in a particular structure and, in some cases, the type of structure itself. Installation, repairs, and maintenance performed by workers who are unfamiliar with the existing system and its unique characteristics creates the danger of accidents, personal injury, damage to property, and service interruptions.

PG&E notes that installation and construction sometimes need to be done at a level slightly above the published GO standards, and that GO 95

and 128 should be viewed as the minimum standards which the utility must meet. At times, safety needs will arise from other laws or standards. In addition, PG&E believes that because not all situations can be anticipated in the GOs or other rules, EUs should be allowed to exercise their judgment if they determine that something is required for safety or reliability reasons.

PG&E states that to determine if poles have adequate space and strength to accommodate a new or reconstructed attachment, the telecommunications carrier requesting the attachment should be required to give the electric utility a complete and accurate engineering analysis for each pole or anchor location. The analysis would show the loading on the pole (a) from existing telecommunications equipment, and (b) from all telecommunications equipment after the attachment, and would consider windloading, bending moment, and vertical loading to determine if the pole(s) are or will be overloaded and overstressed. PG&E argues that until the engineering analysis is done and the pole (s) either are found to have sufficient space and strength for the new attachment, or is upgraded as needed, the telecommunications carrier should not make its attachment. If there are potentially serious or costly consequences for allowing use of electric facilities to provide telecommunications, PG&E argues that the electric utility should not have to allow that access at its peril.

PG&E argues that the ROW access issues in this proceeding overlap to a considerable extent with issues before the Commission in Application (A.).94-12-005/Investigation (I.) 95-02-015, regarding PG&E's response to the severe storms of December 1995. During the evidentiary proceedings reviewing PG&E's response to the December 1995 storm, the Commission staff questioned the adequacy of the windloading requirements in GO 95 for wood power poles. The Division of Ratepayer Advocates (now the

Office of Ratepayer Advocates (ORA) and the Utilities Safety Branch (USB) sponsored testimony in that proceeding, expressing concern that:

> "increasing numbers of joint-use wood power line poles have been found to be structurally overstressed by excessive loading of electrical and communication wires and equipment under the main electrical conductors." (A.94-12-005, Exhibit 510, p. 5-1.)

ORA recommended a complete inspection of PG&E's entire pole inventory for overstressed poles (which would span several years), and improving communications among utilities utilizing the poles. ORA and PG&E disagreed over the interpretation of GO 95 as applied to loading capacity of wire attachments to wood power line poles. ORA's interpretation would increase the threshold at which the existing poles require upgrades and replacements to meet GO 95 standards before any additional facilities could be attached to the pole. PG&E anticipates that under ORA's interpretation, a large percentage of power poles would need to be replaced with stronger grade poles before any additional attachments could safely be made by CLCs. In that proceeding, PG&E, the ORA, and the USB filed joint testimony (Exhibit 517) proposing that the Commission establish an Order Instituting Investigation (OII) to review, among other things, GO 95 design standards on wood pole loading requirements. A Commission decision is pending in A.94-12-005. PG&E believes that there is considerable tension between the requirements and goals in A.94-12-005 and the demands by CLCs in this case for prompt, immediate access to poles, and that the potential for extensive buildout and reconstruction by CLCs complicate and aggravate the problem of overloading and overstressing the poles.

Pacific believes that for jointly owned poles, the standards agreed to by the owners in conjunction with GO 95 and national requirements adequately address safety concerns. With an increased number of parties

seeking attachments, however, Pacific believes that the owners should coordinate attachments by third parties in order to ensure the continuing safety and reliability of the facilities.

The Coalition acknowledges the need for utilities to provide for the safety and reliability of their facilities - so long as the safety and reliability concerns are genuine and have not been manufactured as excuses for a plainly discriminatory access policy. The Coalition argues that any utility that contends that safety and reliability concerns preclude additional attachments should bear the burden of demonstrating that such concerns have not been fabricated as an excuse of denying access.

### 2. Discussion

We generally agree that the incumbent utility, particularly electric utilities, should be permitted to impose restrictions and conditions which are necessary to ensure the safety and engineering reliability of its facilities. In the interest of public health and safety, the utility must be able to exercise necessary control over access to its facilities to avoid creating conditions which could risk accident or injury to workers or the public. The utility must also be permitted to impose necessary restrictions to protect the engineering reliability and integrity of its facilities.

Telecommunications carriers must comply with applicable notification and safety rules before modifying existing attachments. Any unauthorized new attachments or modifications of existing attachments are strictly prohibited. Before an attachment to a utility pole or support structure is made, we shall require successful completion of a fully executed contract.

We shall not adopt specific detailed rules addressing a comprehensive set of safety and reliability requirements given the complexity

and diversity of the technical issues involved. Historically, the Commission's GO 95 and GO 128 have dealt with safety requirements for clearances and separation between conductors on poles or in common trenches. These rules have become accepted industry practice and parties agreed generally that they should continue to be enforced. At a minimum, we expect parties to comply with GOs 95 and 128, as well as other applicable local, state, and federal safety regulations including those prescribed by Cal/OSHA. Attachments to wood poles shall be subject to any restrictions on access which we subsequently adopt in response to the recommendations made by parties in A.94-12-005/I.95-02-015 regarding design standards for utility wood pole loading requirements.

We expect parties to resolve most issues relating to safety and reliability restrictions through mutual negotiation among themselves. In the event that parties cannot resolve disputes among themselves over whether a particular restriction or denial of access is necessary in order to protect public safety or ensure the engineering reliability of the system, any party to the negotiation may request Commission intervention under the dispute resolution procedures we adopt below. In the event of such dispute, the burden of proof shall be on the incumbent utility to justify that its proposed restrictions or denials are necessary to address valid safety or reliability concerns and are not unduly discriminatory or anticompetitive.

## B. Reservations and Reclamation of Capacity

### Parties' Positions

The parties generally agree that access to finite capacity should be granted on a first-come, first-serve basis, but disagree concerning whether or to what extent access to facilities may be denied based on the

incumbent utility's right to reserve currently unused capacity for its own future growth needs.

Pacific and GTEC each argue that the ILEC, as a provider of last resort, must have the ability to reserve capacity for future growth of its own loop network to serve all customers. Pacific's current practice is to construct its conduit and pole lines with sufficient capacity to meet anticipated needs based only on the information available at the time of construction. Pacific does not, however, install all of the cables in all of the ducts at the time of the conduit construction. Upon a request for access, Pacific's forecasts are reviewed and updated to determine current availability. If the original forecast is no longer valid, Pacific will make available the reserved duct for use by third parties. If Pacific is unable to reserve space for future use, it will be forced either to install all of its cables at the time of construction, build additional conduit to meet its service needs, or evict users of the needed duct space under GO 69-C. GO 69-C permits a utility to grant easements, licenses or permits for the use of its operating property without special authorization by the Commission as long as the utility retains the right to reclaim its property if necessary to serve its customers. As GO 69-C promotes both reciprocal access and a utility's continuing ability to provide service upon demand, Pacific believes it is applicable to these proceedings.

Pacific and GTEC both contend that a complete prohibition against their ability to reserve capacity, particularly when that capacity has been reserved for a future use, is a taking of property within the meaning of the Fifth Amendment. In Federal Communications Commission v. Florida Power Corporation. (1986) 480 U. S. 245, the United States Supreme Court held that the prior requirements of § 224, which applied only to cable companies, did not effect an unconstitutional taking, since utility companies were neither required to

permanently give cable companies space on utility poles nor prohibited from refusing to enter into attachment agreements: "Since the Act clearly contemplates voluntary commercial leases rather than forced governmental licensing, it merely regulates the economic relations of utility company landlords and cable company tenants, which regulation is not a per se taking." Id. at 250.

Pacific notes that the Supreme Court , however, was not deciding what the telecommunications carrier outcome would be if the FCC in the future required utilities to enter into, renew or refrain from terminating pole attachment agreements.

> "[Property] law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the innovations." Id. at 252 quoting Loretto v. Teleprompter Manhattan CATV Corporation. (1982) 458 U.S. 419, 436.

Pacific and GTEC claim that denial of their right to reserve space would permit a third party to exercise dominion over the LEC's property, thereby triggering Fifth Amendment scrutiny. At the very least, Pacific argues, the Commission should permit an LEC to reclaim space previously provided to a third party that is necessary for use by the LEC to meet its own service needs.

GTEC argues that it must be able to satisfy both its current needs as well its future space requirements relative to the poles and conduits which it owns, places, and maintains. GTEC forecasts its future space requirements on the basis of a five-year horizon. In order to ensure continued

investment in facilities infrastructure, GTEC argues that facilities owners must be allowed correspondingly to reserve reasonable space for future use, while treating all competitors equally. GTEC argues that depriving it of the ability to maintain reserve capacity would impair service to the public, cause an extraordinary cost increase, and have a significant adverse effect on GTEC's future investment in poles and conduits. If GTEC cannot reserve space in its own facilities, it argues, there is no incentive to construct facilities sufficient to satisfy future needs, with a resulting loss of economic and efficient investment, with long-range strategic planning rendered impossible.

GTEC objects to the FCC's interpretation of § 224(f)(1) as prohibiting GTEC from reserving space on its own facilities for its own future needs. GTEC argues that this interpretation conflicts with § 224(f)(1), which applies the nondiscrimination requirement only to those for whom access must be "provided," not to the owner, whose "access" is synonymous with its ownership right. GTEC contends that the concept of "nondiscriminatory access" does not mean that its rights as an owner of poles and conduits must be relegated to the status of a mere licensee occupant, but only that GTEC must treat equally all companies seeking access.

GTEC further argues that if the Commission were to adopt the FCC's interpretation of the term "nondiscriminatory access" (as used in 47 U.S.C. § 224(f)(1)) precluding an ILEC from reserving space on its own facilities for its own needs, the Commission would effect an unconstitutional taking of GTEC's property. GTEC contends that such a restriction would interfere with its "investment-backed expectations" and "eviscerate" a "critical expectation of GTE" that "additional space would be available as needed in the future."

The Coalition disputes GTEC's argument, noting that § 767.5 only permits attachments in "vacant space" or "excess capacity" on or in utility support structures, and that the statute requires that:

> "... the cable television corporation shall either (1) pay all costs for rearrangements necessary to maintain the pole attachment or (2) remove its cable television equipment at its own expense." (PU Code § 767.5(d).)

Thus, the Coalition argues, a utility has no need to reserve vacant space or excess capacity and keep it, as it were, "lying fallow" until such time as it may need it since the utility can reclaim vacant space if needed.

CCTA notes that the FCC Interconnection Order does allow an electric utility to reserve space for its future use, but only if it is in accordance with a "bona fide development plan" for the delivery of electricity through specific projects.[15] CCTA argues that for purposes of providing any communications services, an electric utility should be on equal terms with other telecommunications companies and the reservation of space for communications would not qualify as a "bona fide development plan." The electric utility must allow the space to be used until it has an actual need for it. CCTA recommends the Commission adopt a ten-year timeframe in which the electric utility will actually use the reserved space, consistent with the rules the Commission adopted to address development plans for the property an electric utility books in its Plant Held For Future Use account.

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[15] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Interconnection between LECs and Commercial Mobile Radio Service providers, First Report and Order, CC Docket No. 95-185, FCC 96-325, ¶ 1170 (August 8, 1996) ("Interconnection Order").

Edison and SDG&E propose that the amount of capacity made available for access be limited to only what is expected to be needed by the telecommunications carrier within a specified time period. Any capacity that the telecommunications provider does not use within that period would revert to the electric utility and become available for another telecommunications provider's use. PG&E also states that the electric utility should be allowed to call back capacity that a telecommunications carrier has utilized in the interim when the need materializes.

PG&E's present practice is to allow telecommunication providers access to overhead distribution facilities until PG&E needs the capacity for electric service. Each telecommunication provider thereby decides between incurring the upgrade costs at the outset, or deferring upgrade until the electric utility's need materializes. PG&E argues that this approach makes sense because future electric distribution capacity needs usually are planned on an area basis, and not on a specific pole/line basis.

PG&E also proposes that the following matters should be completed before a first-come-first-served access authorization is applied in a particular situation: (a) successful completion of negotiations with a fully executed contract; (b) identification of the specific ROW support structures for which an attachment is requested; and (c) payment of the attachment fee in accordance with the executed contract. (PG&E Comments, p. 27.)

The Coalition believes that the Commission should not permit reservations of capacity or, if allowed at all, that they should be strongly disfavored, and permitted only for electric utilitys than can demonstrate there is no other feasible solution and that they had a bona fide development plan prior to the request justifying the reservation. The Coalition argues that adoption of such a policy is critical to the vigorous development of facilities-based

competition in California. The Coalition argues that permitting reservations of capacity for an incumbent's own use enables the incumbent to discriminate against all carriers as long as it has treated them all in an equally harsh and equally discriminatory manner.

Edison and SDG&E oppose the Coalition's proposal requiring the electric utility to demonstrate it has a "bona fide development plan" prior to requesting a reservation of capacity. Edison and SDG&E argue that electric utilitys' obligation to provide safe and reliable electric service can only be met if the utilities can reserve capacity for future use or take back the capacity when needed for electric utility purposes.

Both Edison and SDG&E conduct their capacity planning based on five-year forecasts of the need for additional capacity within different parts of the system. Detailed planning that identifies the specific facilities affected by the need to provide additional capacity usually does not occur until shortly before the need for additional capacity arises. Edison and SDG&E argue that it would be time-consuming and expensive for the utility to make detailed annual capacity forecasts for every facility within its service territory. Moreover, even if there is no anticipated need for additional capacity at a specific facility within a particular one-year period, there will frequently be occasions when there is a need for the capacity after the one-year window. Edison and SDG&E believe "take-back" provisions are essential for meeting these future needs; the utility must either have the ability to "reclaim" such space, or be entitled to construct additional space at the expense of the carrier(s) that otherwise would be "displaced" to make additional room for the utility.

**Discussion**

We must balance two opposing interests in resolving the dispute over reservations of capacity for future use, those of the incumbent

utilities and those of the CLCs. On the one hand, incumbent utilities need to be able to exercise reasonable control over access to their facilities in order to meet their obligation to provide reliable service to their customers over time and plan for capacity needs to accommodate future customer growth. On the other hand, CLCs need to be able to gain access to the ROW and support structures of the incumbent utilities in order to provide local exchange service on a nondiscriminatory basis. The incumbents' reservation of capacity for their own future needs could conflict with the nondiscrimination provisions in § 224(f)(1) of the Act which prohibits a utility from favoring itself or affiliates over competitors with respect to the provision of telecommunications and video services. If the ILEC were permitted to deny access to competitors by reserving capacity for its own needs, the ability of CLCs to compete effectively with the incumbent could be significantly compromised. By virtue of their previous status as monopoly providers of utility service, ILECs have significant control of bottleneck facilities. New competitors lack the advantages of incumbency, and must build and interconnect their systems. The ILECs could use the reservation of capacity defense as a means of staving off competitors and perpetuating their competitive advantage over CLCs. Accordingly, we shall not permit the ILECs to deny access to other telecommunications carrier based on claims that the capacity must be reserved for their own future needs.

While we shall not permit ILECs to deny requests for access based on the need to reserve capacity, we recognize that ILECs should maintain control over their facilities to plan for their own future growth and to provide for sufficient capacity to serve future customers in a reliable manner. In order to address the need of the ILECs to have sufficient capacity to serve future customers, we shall permit the ILECs to reclaim space occupied by competitors when and if it becomes necessary for them to do so. While we shall permit the

reclamation of space by ILECs, we shall require the ILECs first to provide the competing carrier occupying the space the opportunity to pay for the cost of any modifications needed in expanding capacity and to continue to maintain its attachment. Otherwise, the CLC could suffer disruption in its ability to serve its existing customers or to attract new business. We remind CLCs, however, that all carriers have an obligation to complete the calls of their customers, even if they disagree with the underlying interconnection arrangements, as prescribed in D. 97 11 024. We shall place the burden of proof on the CLC in disputes involving the cost of capacity expansions which are required to maintain an attachment and avoid end-user service interruptions.

In the case of EUs, we shall permit a somewhat less restrictive policy regarding their ability to reserve capacity. Electric facility rearrangements can be substantially more expensive than rearrangements of telecommunications facilities. Therefore, it may be more cost effective for parties to mutually agree to permit an electric utility to reserve capacity for some defined period rather than to provide interim access to a CLC with subsequent eviction with related costs for rearrangements. However, even in the case of an electric utility, the lines dividing the provision of electric and telecommunications service may become less distinct in the future. Therefore, concerns regarding anticompetitive motives for denial of access cannot be completely dismissed in the case of EUs.

In those situations where parties cannot agree on the terms of access due to a claim by an electric utility asserting the need to reserve capacity for its own future needs, we shall resolve such situations through our dispute resolution process. In order to justify its capacity reservation claim, the electric utility will be required to show that it had a bona fide development plan for the use of the capacity prior to the request for access, and that the reservation of capacity is needed for the provision of its core utility services within one year of

the date of the request for access. In cases where the capacity will be needed at a future date beyond one year, the electric utility may not assert the reservation of capacity claim as a basis to deny access, but the electric utility may reclaim the space once it is needed to serve future customers as outlined above in the discussion relating to ILECs.

We conclude that the above policy regarding reservations of capacity in no way constitutes an unlawful taking in violation of the incumbent utilities' constitutional rights under the fifth amendment. The rules we establish merely constitute regulation of the terms under which parties may negotiate for access. The access policy we establish does not eliminate the incumbents' ownership of their property nor does it give CLCs dominion over the incumbents' property. Property ownership rights, however, do not give incumbent utilities unlimited discretion to deny access to telecommunications carriers unilaterally. As noted by the Coalition, public utilities are effected with a public interest and are therefore subject to regulation for the public good. The incumbents still retain autonomy over their planning and forecasting of future capacity requirements. Under the rules we establish, the incumbents still retain ultimate control over their property by virtue of their rights to reclaim the capacity and to require the CLC to vacate the space when the incumbent has need of it. Moreover, third parties which elect to remain on the pole shall be required to pay for the cost of rearrangements once the capacity is reclaimed, as discussed below. Therefore, the incumbents are fairly compensated for the use of their property, and there is no unlawful taking.

## VIII. Capacity Expansion and Modification

### A. Parties' Positions

An issue which is closely related to reservation of capacity is that of expansion or modification of existing capacity to accommodate third party carriers' requests for access. If there is no available space on a given utility facility for which access is requested, it may become necessary to expand or rearrange the existing facility to make room for a new attachment. The principle of nondiscrimination set forth in § 224(f)(1) requires that a utility cannot simply deny requests for access on the basis that no space is available without first seeking to accommodate the request through modification of existing facilities or expansion of existing capacity for telecommunications carrier just as it would to meet its own needs for growth.

Pacific and PG&E believe that the party or parties for whose benefit special modifications to facilities are made should assume the cost of the modifications including the cost of rearranging the facilities of parties not participating in the modification. GTEC believes the carriers which require the capacity should incur the expense of new construction once capacity is exhausted. Because of the many variables associated with expanding capacity, GTEC believes no minimum time frames should be set for completion of the expansion. Alternatively, if minimum time frames are to be established, GTEC proposes that a CLC which desired to further expedite the process should be required to pay any extra charges associated with the escalation.

The Coalition proposes that the costs of support structure capacity expansion and other modifications, including joint trenching, be shared by parties attaching to utility support structures according to the principles set forth in the FCC Rules (First Report Secs. 1161-1164; 1193-1216). Under the FCC rules,

parties must bear their proportionate share of cost of a modification to the extent that the modification is made for the specific benefit of the participating parties.

As a general principle, the Coalition believes that the proportionate share of cost assigned to each carrier should correspond to the proportion of total usable capacity used by that carrier. In the case of joint trenching costs, however, the Coalition argues this approach may not always be appropriate in the case of EUs. Due to safety considerations, trenching and installation of conduit for the placement of underground gas pipelines and electric conductors is more elaborate than for direct burial or placement of conduit wire for communications facilities. A deeper and wider trench is required for power utilities' conduits or pipelines. The different requirements for underground placement of power utilities' facilities results in higher costs being incurred than would be the case if only communications facilities were involved. The Coalition argues that TCs should not have to pay more than the costs they would have incurred, based on an independent bid, had they done their own trenching for their own facilities.

Under the FCC rules, written notification of a modification is required at least 60 days prior to the commencement of the physical modification itself, absent a private agreement to the contrary. The Coalition proposes this Commission adopt the FCC notification requirement. Notice is to be specific enough to apprise the recipient of the nature and scope of the planned modification. The notice requirement would not apply if the modification involved an emergency situation.

GTEC would support a type of simple voluntary notification plan, much like a docket service list, to notify companies of joint trench work, with most carriers agreeing to participate in view of the cost savings. GTEC does not believe ILECs should be placed in the position of being the sole coordinators of such functions for the industry.

### B. Discussion

We shall require that the costs of capacity expansion and other modifications, including joint trenching, be shared among all the parties participating in the modifications on a proportionate basis corresponding to the share of new usable space taken up by each carrier. This approach is consistent with that followed by the FCC. We shall adopt the Coalition's recommendation that in the event an energy utility incurs additional costs for trenching and installation of conduit due to safety or reliability requirements which are more elaborate than a telecommunications-only trench, the TCs should not pay more than they would have incurred for their own independent trench.

We shall adopt an advance notice requirement of at least 60 days prior to the commencement of a physical modification to apprise affected parties, except in the case of emergencies where shorter notice may be necessary.

## IX. Obtaining Third-Party Access to Customer Premises

### A. Parties' Positions

During the ROW workshops, various parties raised the issue of how the Commission could assist utilities seeking to obtain access to the full pathway up to and including the minimum point of entry (MPOE) to a customer's premise

Pacific states that the pathway up to and including the minimum point of entry to a customer's premise usually includes facilities in the public ROW and facilities on the property to be served. An LEC only controls the supporting structure that is in the public way; the property owner provides and owns the supporting structure on his or her property. Pacific claims it cannot supercede the property rights of owners by permitting access to third parties. If the utility is able to successfully negotiate access with the property owner, Pacific

offers to provide access to its equipment rooms and other facilities as long as the security and safety of its equipment is not compromised.

In some cases the property owner has determined that a single entity shall provide service to the premises. While acknowledging this can create difficulties if a tenant desires service from a different carrier, Pacific claims this is an issue between the tenant and the property owner, and cannot be resolved by the carrier.

Pacific believes that the Commission should require all utilities to permit nondiscriminatory access to facilities on private property that they own or control, but should not dictate to owners which carrier they must choose to provide service. Pacific proposes that the Commission consider limiting the amount of access or rental fees a carrier is permitted to pay a property owner for access rights.

GTEC agrees to provide access up to the MPOE, to the extent that GTEC owns and there is availability on the poles, conduits, ducts, or the ROW in question. Since the property owner is responsible for facilities beyond the MPOE, however, GTEC opposes a Commission regulation that would abrogate private agreements between such property owners and a carrier which would allow other carriers the ability to trespass on such property without negotiating their own agreement.

While the Coalition acknowledges that this Commission lacks jurisdiction to require non-utility third parties to grant utilities access to their properties, the Coalition argues that there are still important actions the Commission can take to assist CLCs in this area. First, the Coalition asks the Commission to make findings of fact regarding the importance of the development of a new telecommunications infrastructure and deployment of alternative facilities to customer premises by CLCs. The Coalition believes such

findings would be useful in eminent domain proceedings to gain access to tenants' facilities.

The Coalition further asks the Commission to require utilities that have vacant space (excess capacity) in existing entrance facilities (*e.g.*, conduit) into commercial buildings to make such space available up to the MPOE so that competitors may gain access to building cellars, telephone closets (or cages) and risers, network interconnection devices and / or frames, and so forth, in such buildings. Further, the Coalition asks the Commission to require that ILECs not impede such access where it is requested by landlords on behalf of their tenants. Additionally, the Coalition asks that ILECs be required to promptly meet their responsibilities for connecting CLC network interconnection devices (NIDs) with their own. (See, Interconnection Order I, ¶¶ 392-96.) Finally, the Coalition asks that ILECs and incumbent EUs be required to exercise their own powers of eminent domain, just as they would on their own behalf to obtain or expand an existing ROW over private property, in order to accommodate a CLC's request for access.

The Coalition argues that under no circumstances should a building owner or manager be allowed to charge CLCs for use of its inside wire while allowing ILECs unlimited use of the same facilities at no charge. The Coalition suggests that the Commission can exercise its influence to prevent such discriminatory treatment in the following manner. Assuming that the Commission has the authority to regulate building owners as "telephone corporations" as defined under PU Code § 234, the Coalition suggests that the Commission could declare it will refrain from such regulation if, but only if, the building owner makes access to inside-wire available to ILECs and CLCs alike on a nondiscriminatory basis.

Edison and SDG&E argue that an electric utility must be allowed to deny access requests when its property rights do not allow use of the property by a third party. Edison and SDG&E also oppose being required to exercise their powers of eminent domain in order to accommodate a telecommunications provider's request for access, claiming that such an exercise of powers would go beyond the legally authorized limits for EUs. Edison argues that its powers of eminent domain do not allow it to condemn property for the benefit of telecommunications providers. Edison believes that since certificated telecommunication providers have the power of eminent domain, they should not depend upon the EUs to secure their access rights.

Electric utilities also frequently obtain easements or licenses containing provisions that limit use of the property to operations directly related to the generation, transmission or distribution of electricity. Edison argues that it should not be obligated to negotiate broader easements or licenses to allow telecommunications carrier to access the property, since this would impose additional costs on the utility and its customers and shareholders.

### B. Discussion

As acknowledged by all parties, we do not have jurisdiction to require non-utility third parties to grant utilities access to their properties. We recognize, however, that the development of a competitive telecommunications infrastructure and deployment of alternative facilities to customers' premises by CLCs are important to the health of California's economy. The adoption of rules to facilitate the CLCs' ability to negotiate access to customer premises is consistent with our policy of opening all telecommunications markets to competition. To the extent that owners of buildings and their tenants are able to choose among multiple telecommunications carriers, they are likely to benefit

from higher quality service at lower cost and with greater responsiveness to customers' needs.

To facilitate the development of the competitive telecommunications infrastructure, we shall require that incumbents with vacant space in existing entrance facilities (e.g., conduit) into commercial buildings make such space available to competitors up to the MPOE. This requirement will enable CLCs to gain access to building cellars, telephone closets, and network interconnection devices (NIDs) in such buildings. We shall also require that ILECs promptly meet their responsibilities for connecting CLC NIDs with their own. Incumbent utilities shall be required to exercise their powers of eminent domain where necessary to expand their existing ROW over private property to accommodate a CLC's request for access in the same manner that the incumbents would be required to modify their poles or conduits to permit CLC attachments. The CLC shall reimburse the utility for its costs incurred in such efforts on behalf of the CLC. In some instances, the CLC may conclude it is more cost effective to pursue its own eminent domain litigation rather than contracting for litigation through the incumbent. The eminent domain powers of a CLC are covered under PU Code § 616, which states that "a telephone corporation may condemn any property necessary for the construction and maintenance of its telephone system."

We disagree with the Coalition's claim that owners or managers of buildings may be classified as "telephone corporations" subject to Commission jurisdiction under PU Code § 234 merely because they provide telecommunications services to the tenants of their building. A telephone corporation must hold itself out as a provider of service to the public or some portion thereof. Merely because a building owner or manager provides private service to tenants within the building, there is no basis for treatment as a

"telephone corporation" as defined by § 234. Consequently, we have no jurisdiction to require such building owners to provide access of their inside wire to CLCs.

## X. Third Party Access to Jointly-Owned Facilities

### A. Parties' Positions

Utility distribution poles and anchors have been traditionally owned under joint ownership agreements between two or more entities with a need to have their lines or equipment strung on common poles to reach customers throughout a given geographic area. Joint pole associations have traditionally fostered access to and the joint ownership of pole facilities. Membership is comprised of ILECs, CLCs, wireless providers, municipalities, and electric and water utilities. Pursuant to such joint pole associations, third parties have acquired access to jointly owned poles as tenants of one of the owners. In their comments, parties addressed the issue of whether existing joint pole associations were an adequate vehicle to protect the interests of third parties seeking access to facilities.

GTEC recommends that the existing process of access through joint pole associations has worked well and should continue and not be supplanted with an untested method. Those third parties who are non-members may apply to become members of the association. GTEC argues that it is not necessary for yet another organization to be established to protect the interest of third parties, as this would be incompatible with the current joint pole association process, and would needlessly complicate a currently effective system.

PG&E believes that provisions addressing the rights and responsibilities of a joint owner are needed when allowing third parties access to the jointly owned poles as tenants. PG&E argues that third party connections

also must comply with safety and reliability requirements, and should not take precedence over the use of the pole by any joint owner for its current or future utility service.

PG&E believes that, with the restructuring of the telecommunications and the electric industry, the Commission needs to carefully consider how the obligations and compensation for pole ownership and/or use should be structured to provide a reasonable balance between responsibility for and benefits from the pole system. PG&E believes that ultimately all users will need to pay for their pole use in a manner that is either market based or economically equivalent to sharing fully the ownership costs and responsibilities for facilities subject to shared ownership.

PG&E argues that third party tenants' quality of access cannot exceed the access which their licensor or leasor enjoys under the Joint Pole Agreement, and that the joint owner must be able to provide for its own capacity requirement before accommodating third party requests. PG&E suggests that a telecommunications entity which does not wish to join the Joint Pole Association, but still desires the same quality of access as an owner, can negotiate a separate joint ownership agreement with the entity or entities holding ownership interests in the pole.

The Coalition states that new distribution facilities constructed by a member of a joint pole organization will ordinarily be subject to the rules governing members of that organization, whereas new distribution facilities constructed by a party that is not a member of a joint pole organization would not be subject to joint pole association rules. Since several of the members of the Coalition are also members of joint pole associations, the Coalition states it is not in a position to comment on whether a different vehicle is needed to protect the interests of third parties.

Since such organizations are controlled by regulated utilities, they are agents of parties subject to the Commission's jurisdiction. Even though joint pole organizations are not themselves public utilities, the Coalition argues they are fully subject to Commission jurisdiction and control, through the operation of the ordinary principles of agency law. Therefore, the Coalition believes the Commission can take whatever steps it deems necessary to protect the interest of third parties. The Coalition further claims that the Commission has authority to provide for reciprocal access by privately-owned utilities to the ROW and support structures owned by local governmental agencies to the extent those agencies are members of joint pole associations and receive benefits from such membership.

The Coalition argues that the utility members of any joint pole organization must not be permitted to degrade access to utility support structures and ROW directly or indirectly, simply because an attaching party has chosen not to become a full member of such an organization.

### B. Discussion

We conclude that the provisions governing third-party access to utility facilities previously discussed should also apply in the case of facilities which are owned collectively through joint pole associations or similar arrangements. Based on parties' comments, we find no need at this time to make any further modifications in the existing arrangements governing joint pole associations to protect third parties that do not belong to a joint pole association. Likewise, no party seeking access to a utility pole should be discriminated against merely because it is not a member of such an association. We may at a later time consider the needs for additional rules to protect against unfair discriminatory treatment for nonmembers of joint pole associations.

## XI. Expedited Dispute Resolution

### A. Parties' Positions

Parties present differing views regarding how the Commission should facilitate the resolution of disputes in the event parties cannot reach agreement through negotiations over the terms and conditions of ROW access.

In its proposal, the Coalition distinguishes disputes over requests for initial access versus all other disputes over access. The Coalition recommends that the Commission develop a new type of expedited and informal proceeding for resolving disputes concerning initial access to utility support structures, patterned after the Commission's existing Law and Motion procedure for discovery dispute resolution. This new type of proceeding would be presided over by an ALJ, assisted by Telecommunications Division or the Safety and Enforcement Division staff with relevant experience and knowledge of utility support structures. The hearing would not be reported. The ALJ would hear the initial access dispute and resolve it, either at the hearing or within no more than three working days, employing such fact finding techniques as necessary for expeditious resolution of the initial access dispute.

The Coalition claims that the Commission's existing formal complaint process is much too slow and cumbersome for resolution of such disputes. Absent an expedited dispute resolution procedure, the Coalition argues, the CLC must either comply with the terms of access, which may be difficult, expensive and time-consuming, or file a complaint for relief at this Commission, which may be an equally difficult, expensive, and time-consuming process, while, in the meantime, access is denied.

For all other disputes between ILECs and telecommunications carrier involving access to ILEC utility support structures (*i.e.,* disputes concerning other than initial access), the Coalition agrees that arbitration is a

useful alternative to the use of the Commission's existing complaint process. (See, Interconnection Order 1, ¶¶ 1227, 1228; see also, Commission Resolution ALJ-174 (adopting arbitration procedures for resolution of interconnection agreement disputes).)

CCTA believes that the process established by the Act and the FCC provide a good starting point for expedited resolution by this Commission of disputes involving denial of access. The FCC Order requires the requesting party to provide the ROW or facility owner a written request for access. If access is not granted within 45 days of the request, the ROW or facility owner must confirm the denial in writing by the 45th day. Upon the receipt of a denial notice from the ROW or facility owner, the requesting party has 60 days to file its complaint with the FCC, and final decisions relating to access are to be resolved by the FCC expeditiously. (Interconnection Order ¶ 1225.) The requesting party also may seek arbitration pursuant to § 252 of the Act which governs procedures for the negotiation, arbitration, and approval of certain agreements between ILECs and telecommunications carrier. If arbitration is undesirable or proves unsuccessful, then court proceedings are an alternative.

CCTA proposes additional dispute resolution procedures for situations in which parties have already entered into contracts for access to ROW. Specifically, CCTA proposes that such disputes be negotiated by field personnel first. If the dispute remained after two days, it could be forwarded to the supervisor of the field representative. After five days, it would go to the Engineering Manager. After five more days, it would go to the Utility Manager-General Agreements. If the dispute remained after five more days, it would go to arbitration.

Pacific supports an expedited dispute resolution process, but argues that parties must be required to attempt to resolve their differences in good faith before bringing them before the Commission. Pacific proposes that if the Commission adopts a similar expedited review process as prescribed by the FCC, the Commission should require the parties to first attempt to resolve any dispute themselves before going to the Commission. Pacific also argues that it may take longer than 45 days to determine availability for more complicated requests for access.

GTEC does not oppose an expedited process to resolve disputes concerning access to ROW that arise out of negotiated or arbitrated agreements, but asks the Commission not to permit such a dispute resolution process to improperly circumvent or replace of the negotiation process required by § 252 of the Act.

Edison believes that the procedures prescribed in § 252 have the potential to distort the negotiating process and to impose a significant additional burden on the Commission and its staff. Rather than negotiating in earnest, Edison argues, parties may be tempted to state their demands and then insist that the Commission arbitrate a solution. Unless all parties to the negotiation request the Commission's assistance as mediator, Edison argues, the Commission should refrain from any role in the parties' negotiations. If negotiations fail to produce an agreement, Edison believes the Commission's role as arbitrator should be limited to imposing appropriate conditions to prevent discrimination among competing carriers and unreasonable restrictions to access, and the Commission should limit inquiry to the two following issues:

1. Is the utility insisting on a prohibitive pricing arrangement as a means of favoring one carrier over another?

2. Are the non-pricing terms and conditions sought by the utility reasonably related to legitimate concerns about safety, limitations on liability and system reliability and stability, and are they being applied in a non-discriminatory manner to all similarly situated carriers?

Edison argues that the carrier should have the burden of demonstrating that the utility has discriminated against that carrier or sought to impose unreasonable restrictions to access.

PG&E believes that to the extent a dispute involves expert engineering issues such as those relating to GO 95, responsibility and authority for hearing and resolving the dispute should be referred to Commission-designated experts whose education and training qualify them to decide engineering matters. Moreover, PG&E believes their interpretations should have precedential authority for GO 95 purposes generally. PG&E therefore recommends that the Commission designate specific members of its engineering staff experienced in GO 95 to be responsible for GO 95 interpretation and implementation, including resolution of disagreements about the application of GO 95 to any specific ROW access dispute,[16] to achieve technically sound, consistent and timely interpretations. PG&E also recommends that the expedited proceeding allow for an evidentiary record to be transcribed.

[16] In making this suggestion, PG&E recognizes that the parties to the December storm proceeding have recommended an OII into design standards in GO 95. Pending the resolution of the OII proposal, however, PG&E argues that users of poles need a way to resolve GO 95 questions which will result in sound engineering results, while also supporting construction of new telecommunication lines, to the extent consistent with GO 95 and other applicable standards.

### B. Discussion

The rules, guidelines, and performance standards adopted herein should reduce the extent of disputes and impasses among the parties in negotiating ROW access agreements. Nonetheless, our adopted rules leave discretion to the parties to negotiate individual agreements, and leave the potential for disputes to arise. We shall therefore adopt an expedited procedure for resolving disputes relating to access to ROW and support structures as set forth below. We expect parties to make a good faith effort to resolve their disputes before bringing them before the Commission. As a condition of the Commission's accepting a dispute for resolution, the moving party must show that they have attempted in good faith to negotiate an arrangement which is consistent with the rules and policies set forth in this decision. This showing must be included in the request for dispute resolution. The burden of proof shall be on the party which asserts that a particular constraint exists preventing it from complying with the proposed terms for granting ROW access.

For purposes of resolving disputes regarding ROW access, we shall generally apply the approach previously adopted in D.95-12-056 for dealing with disputes over interconnection agreements. The procedures for Commission resolution of interconnection disputes set forth in D.95-12-056 lend themselves also to disputes regarding ROW access. The adopted approach involves a four-step process: (1) informal resolution without Commission intervention; (2) dispute resolution with ALJ mediation; (3) ALJ ruling proposing a resolution; and (4) expedited complaint.

The following prerequisites must be satisfied as evidence of good faith negotiations prior to the Commission's acceptance of a request for resolution of a ROW dispute. The party seeking access must first submit its request to the utility in writing. As discussed previously, we are establishing a

default deadline of 45 days for a utility to confirm or deny whether it has space available to grant requests for access to its support structures or ROW. If the request is denied, the utility shall state the reasons for the denial or why the requested space is not available, and include all the relevant evidence supporting the denial. In the event of a denial, Step 1 of the dispute resolution process is invoked. We shall expect the parties to escalate the dispute to the executive level within each company to attempt to negotiate an alternative access arrangement to accommodate their mutual needs. If the parties are unable to reach a mutually agreeable solution after five days of good-faith efforts at negotiation, any party to the negotiations may request the Commission to mediate or to arbitrate the dispute. Parties shall have 10 business days to prepare for the mediation session. We shall not require all parties to a dispute to request Commission intervention since a party could withhold consent for Commission intervention as a means of delay in reaching agreement or in forcing a party to accept unfair terms.

If mediation fails to produce a resolution, , the ALJ will direct parties to submit short pleadings within 10 business days and issue a written ruling within 20 business days to resolve the dispute. The ALJ shall use our adopted preferred outcomes as guideline under which disputes will be reviewed and resolved. If a party objects to the ALJ's ruling, it may then file a formal complaint under the Commission's expedited process described below.

Parties who wish to avail themselves of the expedited complaint process, must include in their complaint a showing that they have pursued each previous step of the dispute resolution process described above. Parties who choose to challenge an unfavorable ALJ ruling will bear a heavy burden of proof in the expedited complaint proceeding. The expedited complaint process we establish today shall adhere to the same rules established for expedited

complaints in Rule 13.2 of our Rules of Practice and Procedure, except that a court reporter may be present at the. hearing. Any Commission decision rendered may include separately stated findings of fact and conclusions of law. Any written documents submitted by the parties as part of the dispute resolution process may be discoverable by parties to the expedited complaint proceeding.

We will leave it to the discretion of the ALJ presiding to conduct the dispute resolution process, to establish service lists, and to determine the need for any written submittals in the proceeding. The motion requesting mediation need only be served on parties to the dispute, the assigned ALJ, and the Director of the Telecommunications Division. The motion should also be served on the Docket Office which will publish a notice of the motion in the Daily Calendar.

To facilitate the speedy resolution of disputes, we will generally discourage parties who are not part of the dispute from participating in the mediation process.[17] Any resolution that results from the dispute resolution process will generally be nonprecedential. However, if a dispute raises generic issues or affects others, the presiding ALJ may solicit comments and testimony from all parties to the dispute; and the Commission may issue decisions. Our normal rules of practice and procedures should be followed at all times during the dispute resolution process.

We shall not adopt PG&E's request that only Commission-designated experts with education and training in engineering be assigned to resolve disputes involving engineering issues. We shall continue to rely on the

[17] To avoid a party's need to become part of the service list of a specific dispute in order to obtain an ALJ ruling on the merits of the dispute, we shall make copies of the ALJ ruling available through our Formal Files.

Commission's long established practice to use ALJs to adjudicate and to mediate contested proceedings which come before the Commission. The ALJ is specifically equipped to resolve contested issues dealing with a variety of technical disputes as well as legal matters. The assigned ALJ routinely consults with technical staff employed by the Commission with education and training in the area of expertise called for by the nature of the dispute as necessary to understand and resolve technically complex disputes. It would not be the best use of Commission resources to deviate from this successful practice by assigning a Commission staff expert with training in engineering matters to be responsible for mediating or arbitrating such contested issues. Therefore, all disputes regarding ROW access, including those dealing with engineering or safety issues shall be referred to an ALJ for resolution. The ALJ shall consult with the Commission's technical staff as appropriate to deal with engineering, safety, or other technically complex issues in dispute among the parties.

## Findings of Fact

1. Under § 224 of the Telecommunications Act of 1996, both incumbent local exchange carriers and electric utilities have an obligation to provide any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

2. Nondiscriminatory access to the incumbent utilities' poles, ducts, conduits, and rights of way is one of the essential requirements for facilities-based competition to succeed.

3. Given the complexities and the diversity of ROW access issues, it is not practical to craft uniform tariff rules which address every situation which may arise.

4. The adoption of general guiding principles, and minimum performance standards concerning ROW access will promote a more level competitive playing field in which individual negotiations may take place.

5. The general provisions of PU Code § 767 relating to reciprocal access of utility support structures and ROW apply to all public utilities, independently of any reciprocal requirements under the Act.

6. CMRS providers will be using poles and other utility facilities in ways perhaps not contemplated by traditional land-line providers, and any rules adopted by the Commission need to accommodate innovative pole uses required by new technologies.

7. Exclusive reliance on the negotiation process will not necessarily produce fair prices for ROW access.

8. Given the advances in technological capabilities of cable television providers to offer a wide array of both one-way and two-way communications services over their cable facilities, it has become increasingly difficult to clearly delineate a cable television provider as offering only "cable video" service as opposed to "telecommunications" services.

9. PU Code § 767.5(a)(3) applies the term "pole attachment" to any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure or ROW of a public utility.

10. PU Code § 215.5 defines a "cable television corporation" as "any corporation or firm which transmits television programs by cable to subscribers for a fee," but makes no reference to the provision of two-way telecommunications services.

11. Section 224(d) and (e) of the Act explicitly anticipate different rate provisions will apply to cable operators depending on whether they offer cable television service exclusively or whether they also offer telecommunications services.

12. The Coalition's proposed 7.4% allocation of capital costs which may be charged for pole attachments is based on the statutory formula in § 767.5(c), and may bear little or no discernible relationship to the actual percentage of space associated with providing a pole attachment to a telecommunications carrier.

13. The use of embedded cost as a pricing basis for pole attachments is more conducive to the development of competitive market than the use of incremental costs.

14. Prices based on embedded costs of utility pole attachments are lower than incremental costs due to the fact that many of the poles were installed decades ago and have largely been depreciated for accounting purposes over time.

15. If incumbent utilities were free to charge incremental-cost-based rates or even higher rates based on their bargaining leverage, they would be able to extract excessive economic rents associated with these highly depreciated assets while forcing the CLCs to pay rates which may impede their ability to compete.

16. Under the terms of an agreement executed between Pacific and AT&T, Pacific agreed to provide information to AT&T regarding the availability of conduit or poles within 10 business days of receiving a written request, and within 20 business days, if a field-based survey of availability was required.

17. Under the terms of their agreement, if AT&T's written request sought information about the availability of more than five miles of conduit, or more than 500 poles, Pacific agreed to: (1) provide an initial response within 10

business days; (2) use reasonable best efforts to complete its response within 30 business days; and (3) if the parties were unable to agree upon a longer time period for response, Pacific would hire outside contractors, at the expense of the requesting party.

18. The terms of the PG&E / AT&T agreement regarding the time frame for responding to requests about access to ROW provide a reasonable basis for formulating generic rules.

19. It is in the interests of public health and safety for the utility to exercise necessary control over access to its facilities to avoid creating conditions which could risk accident or injury to workers or to the public.

20. When working on an electric utility's facilities or ROW, telecommunication providers compliance with at least the same safety practices as trained and experienced electric utility workers is necessary to avoid exposing the public to grave danger and potentially fatal injuries.

21. Changing the size or type of any attachment, or increasing the size or amount of cable support by an attachment (including overlashing existing cable with fiber optic cable) has safety and reliability implications that the utility must evaluate before work begins.

22. Commission GO 95 and CAL-OSHA Title 8 generally address the safety issues that arise from third-party access to the utility's overhead distribution facilities.

23. Because of the confined space in underground electric facilities (e.g., underground vaults) and the associated increased safety concerns, advance notification and utility supervision is required as conditions of granting

telecommunications carrier access to underground electrical facilities in addition to the requirements of GO 128 and CAL-OSHA Title 8.

24. To determine if poles have adequate space and strength to accommodate a new or reconstructed attachment, an engineering analysis is needed for each pole or anchor location to show the loading on the pole (a) from existing telecommunications equipment, and (b) from all telecommunications equipment after the attachment, accounting for windloading, bending moment, and vertical loading.

25. The ROW access issues in this proceeding interrelate with issues before the Commission in Application (A.) 94-12-005 / Investigation (I.) 95-02-015, regarding PG&E's response to the severe storms of December 1995.

26. Parties in A.94-12-005 proposed that the Commission establish an Order Instituting Investigation (OII) to review, among other things, the adequacy of GO 95 design standards on wood pole loading requirements.

27. Incumbent utilities need to be able to exercise reasonable control over access to their facilities in order to meet their obligation to provide reliable service to their customers over time and to plan for capacity needs to accommodate future customer demand.

28. The incumbents' reservation of capacity for their own future needs could conflict with the nondiscrimination provisions in § 224(f)(1) of the Act which prohibits a utility from favoring itself or affiliates over competitors with respect to the provision of telecommunications and video services.

29. Since electric utilities are not yet in direct competition with CLCs, but are engaged in a separate industry, the potential concerns over a reservation policy

permitting discriminatory treatment of a competitor are not as pronounced as compared with ILECs.

30. The development of a new telecommunications infrastructure and deployment of alternative facilities to customer premises by CLCs is important to the development of a competitive market.

31. Utility distribution poles and anchors have been traditionally owned under joint ownership agreements between two or more entities with a need to have their lines or equipment strung on common poles to reach customers throughout a given geographic area.

32. New distribution facilities constructed by a member of a joint pole organization, will ordinarily be subject to the rules governing members of that organization, whereas new distribution facilities constructed by a party that is not a member of a joint pole organization, would not be subject to joint pole association rules.

33. The procedures for Commission resolution of interconnection disputes set forth in D.95-12-056 lend themselves also to disputes regarding ROW access.

## Conclusions of Law

1. This Commission has jurisdiction under the Act to exercise reverse preemption regarding rules governing nondiscriminatory access to ROW, and is not obligated necessarily to conform to the FCC rules.

2. In order to establish its jurisdiction, the Commission must satisfy the conditions of § 224(c)(2) and (3) which requires the state to certify to the FCC that:

A. it regulates such rates, terms, and conditions; and

B. in so regulating, that it has the authority to consider and does consider the interests of the subscribers of the services offered via

such attachment, as well as the interests of the consumers of the utility service.

3. The rules adopted in the instant order meet the requirements of § 224(c)(2) and (3), and constitutes certification to the FCC of this Commission's assertion of its jurisdiction.

4. Consistent with the intent of Congress in enacting § 224(f), cable operators and telecommunications providers should be permitted to "piggyback" along distribution networks owned or controlled by utilities as opposed to having access to every piece of equipment or real property owned or controlled by the utility.

5. Nondiscriminatory access requires that similarly situated carriers be provided access to the ROW and support structures of the incumbent utilities under impartially applied terms and conditions, but does not divest the incumbent utility of all of the benefits or the management obligations of ownership.

6. The incumbent utility may not deny access simply to impede the development of a competitive market and to retain its competitive advantage over new entrants.

7. Under the nondiscrimination principles of the Act, incumbent utilities must provide all telecommunications carrier, including commercial mobile radio service (CMRS) providers, the same type of access they would afford themselves, regardless of the technology the telecommunications carrier employs.

8. CMRS providers should be permitted access to taller utility poles or to the tops of poles where necessary to provide service and absent any valid safety or reliability concerns which may be identified by the incumbent utility.

9. It is beyond the jurisdiction of this Commission to compel municipally-owned utilities to provide nondiscriminatory access to their poles, ducts, conduits, and ROW.

10. PU Code Section 7901 grants telephone corporations authority to construct telephone lines and erect poles and other support structures along and upon public highways, but to do so in a manner which does not incommode the public use of highways.

11. In § 7901.1(a), the California Legislature stated that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed," but under § 7901.1(b), the "control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner."

12. If a municipal corporation fails to discharge its duty to treat "all entities in an equivalent manner" when exercising its powers (§ 7901.1(b)), then an entity should be able to invoke any available regulatory, administrative, and civil remedies that govern allegedly unlawful actions by the municipality.

13. PU Code Section 762 authorizes this Commission to order the erection and to fix the site of facilities of a public utility where necessary to secure adequate service or facilities.

14. Under § 253(d) of the Act, the FCC may preempt a local government's regulation that prohibits or has the effect of prohibiting any from providing interstate or intrastate telecommunications service.

15. In the case of existing agreements for access with clauses making them subject to renegotiation in light of a Commission directive, parties should be free to seek renegotiation to conform to the provisions of this decision.

16. Where parties have negotiated a preexisting contract not to provide for revision of its terms to reflect a subsequent action by this Commission, parties shall not be required to retroactively modify such a contract.

17. Any new contracts for access to utility ROW and support structures executed after the effective date of this decision are subject to future modification as a result of any subsequent rules adopted by this Commission.

18. Consistent with the requirements of PU Code § 767, a CLC may not arbitrarily deny an ILEC's request for access to the CLC's facilities or engage in discrimination among carriers.

19. The incumbent utilities have a right to be fairly compensated for providing third-party access to their poles and support structures.

20. By virtue of their incumbent status and control over essential ROW and bottleneck facilities, the local exchange carriers (LECs) and electric utilitys have a significant bargaining advantage in comparison to the CLC with respect to negotiating the terms of ROW access.

21. The pricing formula prescribed in PU Code § 767.5(c) is applicable only to cable television providers who do not also offer telecommunications services.

22. Pole attachment rates charged to cable providers offering telecommunications services which differ from the rate formula for cable services prescribed in § 767.5(c) are not per se discriminatory.

23. Distinctions in the rate treatment of cable versus telecommunications services under the Act is not unfairly discriminatory as long as all providers of such services are treated in a manner consistent with the nature of the service they offer.

24. Parties should file comments as to what practical means can be established to minimize disputes over whether a cable operator is using a particular pole attachment to provide telecommunications services as opposed to cable television or other specialized services other than telecommunications services, and to address how to enforce the proper rates for the use of pole attachments as provided for in pole attachment agreements.

25. Pricing principles applicable to pole and support structure attachment rates should be determined in a manner which promotes a balanced bargaining position between incumbent utilities and telecommunications providers in a nondiscriminatory manner.

26. Utility pole attachments for telecommunications services priced on the basis of historic or embedded costs of the utility less accumulated depreciation will help ensure nondiscriminatory treatment among all telecommunications carriers.

27. Parties may negotiate pole attachment rates which deviate from the cost standards prescribed under this order, but, if having been unable to reach agreement, they submit the dispute to the Commission for resolution, the Commission's rules should apply as the default rate based upon the use historical embedded costs.

28. Utilities should be allowed to recover their actual expenses for make-ready rearrangements performed at the request of a telecommunications carrier, and their actual costs for preparation of maps, drawings, and plans for attachment to or use of support structures.

29. Prices based on the recovery of embedded capital costs reasonably compensates the utility for the provision of access to its poles and support structures.

30. Parties should comment on the most expeditious way to develop updated embedded cost data for the utility poles and support structures for the incumbent LECs and electric utilities and the appropriate percentage allocation of those costs attributable to attachments used to provide telecommunications services from which prices can be determined.

31. Given the varying degrees of complexity and of geographic coverage involved in requests for information concerning facility availability and requests for access, there is no single standard length of time for utility responses which will fit all situations.

32. The CLC could suffer unreasonable delays in receiving information concerning ROW access inquiries if the utility's response time obligation was open-ended, with no performance standards against which to hold the utility, thereby impeding the ability of the CLC to enter the market or to expand its operations to compete efficiently.

33. The incumbent utility's guideline for response time for initial requests concerning availability of space shall not exceed 10 business days if no field survey is required, and shall not exceed 20 business days if a field-based survey of support structures is required.

34. In the event that an initial inquiry involves more than 500 poles or 5 miles of conduit, the response time shall be subject to the negotiations of the carriers involved.

35. In the event that a telecommunications carrier decides after the initial response concerning availability that it wishes to use the incumbent utility's space, the telecommunications carrier must so notify the incumbent in writing.

36. The incumbent utility shall then respond to the telecommunications carrier within 45 days, thereafter, with a list of the rearrangements or changes required to accommodate the carrier's facilities, and an estimate of the utility's portion of the rearrangements or changes.

37. The standard for protection of confidential data should not be one-sided, but should be equally applied to CLCs, incumbent utilities, and any other party to a ROW access agreement.

38. The dissemination of information which has been identified as commercially sensitive should be limited only to those persons who need the information in order to respond to or to process an inquiry concerning access.

39. The incumbent utility, particularly electric utilities, should be permitted to impose conditions on the granting of access which are necessary to ensure the safety and engineering reliability of its facilities.

40. Telecommunications carriers seeking to attach to utility poles and support structures should comply with applicable Commission GOs 96 and 128, and other applicable local, state, and federal safety regulations including those prescribed by Cal/OSHA.

41. Attachments to wood poles are subject to any restrictions on access subsequently adopted in A.94-12-005/I.95-02-015 regarding design standards for utility wood pole loading requirements.

42. In resolving disputes over ROW access, the burden of proof shall be on the incumbent utility to justify any proposed restrictions or denials of access which it

claims are necessary to address valid safety or reliability concerns and to show they are not unduly discriminatory or anticompetitive.

43. All other factors being equal, competing carriers' access to utility facilities should be granted on a first-come, first-served basis.

44. The ILECs should not be permitted to deny access to other telecommunications carrier based on claims that the capacity must be reserved for their own future needs.

45. While the reclamation of space by incumbents may be permitted, the ILECs must provide the competing carrier occupying the space the option of paying its share of necessary modifications or a reasonable amount of time to vacate the space and to make alternative arrangements.

46. In order to justify a capacity reservation claim, the electric utility should show that it had a bona fide development plan for the use of the capacity prior to the request for access, and that the reservation of capacity is needed for the provision of its core utility services within one year of the date of the request for access.

47. Because rearrangements for electric facilities can be substantially more expensive than for telecommunications facilities, it may be more cost effective for an electric utility to reserve capacity for some defined period rather than to provide interim access to a CLC with subsequent eviction or to incur related costs for rearrangements.

48. The restrictions regarding reservations of capacity adopted in this order in no way constitutes an unlawful taking in violation of the incumbent utilities' constitutional rights, but merely constitute regulation of the terms under which parties may negotiate for access.

49. The costs of capacity expansion and other modifications, including joint trenching, should be shared among the parties participating in the modifications on a proportionate basis corresponding to the share of usable space taken up by each carrier.

50. In the event an energy utility incurs additional costs for trenching and installation of conduit due to safety or reliability requirements which are more elaborate than a telecommunications-only trench, the telecommunications carriers should not pay more than they would have incurred for their own independent trench.

51. An advance notice should be given at least 60 days prior to the commencement of a physical modification to apprise affected parties, except in the case of emergencies where shorter notice may be necessary.

52. Incumbent utilities with vacant space in existing entrance facilities (e.g., conduit) into commercial buildings should make such space available to competitors up to the minimum point of entry.

53. Incumbent utilities should be required to exercise their powers of eminent domain to expand the incumbent's existing ROW over private property where necessary to accommodate a telecommunications carrier's request for access, to be paid for by the carrier.

54. The Commission does not have jurisdiction to regulate building owners or managers as "telephone corporations" under PU Code § 234, nor to require that they provide equal access to all carriers.

55. The provisions governing third-party access to utility facilities adopted in this order should also apply in the case of facilities which owned collectively through joint pole associations or similar arrangements.

56. For purposes of resolving disputes regarding ROW access, the rules previously adopted in D.95-12-056 regarding the standards for dealing with disputes over interconnection agreements should generally apply.

57. Before the Commission will process a dispute resolution, the parties must show they were unable to reach a mutually agreeable solution consistent with the rules and policies set forth in this decision after good faith efforts at negotiation.

58. The burden of proof should be on the party which asserts that a particular constraint exists which is preventing it from complying with the proposed terms for granting ROW access.

59. Any party to a negotiation for ROW access may request to Commission to mediate or to arbitrate the dispute pursuant to the four-step process generally outlined in D.95-12-057, and set forth in the Appendix A Rules.

## O R D E R

**IT IS ORDERED** that:

1. The rules set forth in Appendix A concerning the rights and obligations of public utilities to provide access to telecommunications carriers to the poles, ducts, conduits, and rights of way are hereby adopted.

2. The assigned Administrative Law Judge shall solicit comments within 60 days on the most expeditious way to update costs to determine rates for attachments to poles and other support structure used to provide telecommunications services. Comments shall also be taken concerning the implications of joint pole association attachment agreements as they relate to nondiscriminatory access.

Dated _____, at San Francisco, California.

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Appendix A

## APPENDIX A

## COMMISSION-ADOPTED RULES GOVERNING ACCESS TO RIGHTS-OF-WAY AND SUPPORT STRUCTURES OF INCUMBENT TELEPHONE AND ELECTRIC UTILITIES

I. PURPOSE AND SCOPE OF RULES

II. DEFINITIONS

III. REQUESTS FOR INFORMATION

IV. REQUESTS FOR ACCESS TO RIGHTS OF WAY AND SUPPORT STRUCTURES

- A. TIME FOR RESPONSE TO REQUESTS FOR ACCESS
- B. TIME FOR COMPLETION OF MAKE READY WORK
- C. USE OF THIRD PARTY CONTRACTORS

V. NONDISCLOSURE

- A. DUTY NOT TO DISCLOSE PROPRIETARY INFORMATION
- B. SANCTIONS FOR VIOLATIONS OF NONDISCLOSURE AGREEMENTS

VI. PRICING AND TARIFFS GOVERNING ACCESS

- A. GENERAL PRINCIPLE OF NONDISCRIMINATION
- B. MANNER OF PRICING ACCESS
- C. TARIFFS

VII. RESERVATIONS OF CAPACITY FOR FUTURE USE

VIII. MODIFICATIONS OF EXISTING SUPPORT STRUCTURES

- A. NOTIFICATION TO PARTIES ON OR IN SUPPORT STRUCTURES
- B. NOTIFICATION GENERALLY

C. SHARING THE COST OF MODIFICAITONS

IX. EXPEDITED DISPUTE RESOLUTION PROCEDURES

X. ACCESS TO CUSTOMER PREMISES

XI. SAFETY

## I. PURPOSE AND SCOPE OF RULES

A. These rules govern access to public utility rights-of-way and support structures by telecommunications carriers in California, and are issued pursuant to the Commission's jurisdiction over access to utility rights of way and support structures under the Federal Communications Act, 47 U.S.C. § 224(c)(1) and subject to California Public Utilities Code §§ 767, 767.5, 767.7, 768, 768.5 and 8001 through 8057. These rules are to be applied as guidelines by parties in negotiating rights of way access agreements. Parties may mutually agree on terms which deviate from these rules, but in the event of negotiating disputes submitted for Commission resolution, the adopted rules will be deemed presumptively reasonable. The burden of proof shall be on the party advocating a deviation from the rules to show the deviation is reasonable, and is not unduly discriminatory or anticompetitive.

## II. DEFINITIONS

A. "Public utility" or "utility" includes any person, firm or corporation, privately owned, that is an electric, telephone, gas, water, steam or other utility which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for telecommunications purposes.

B. "Support structure" includes, but is not limited to, a utility pole, anchor, duct, conduit, manhole, or handhole.

C. "Pole attachment" means any attachment to surplus space, or use of excess capacity, by a telecommunications carrier for a communications system on or in any support structure owned, controlled, or used by a public utility.

D. "Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the Commission, to allow its use by a telecommunications carrier for a pole attachment.

E. "Excess capacity" means volume or capacity in a duct, conduit, or support structure other than a utility pole or anchor which can be used,

pursuant to the orders and regulations of the Commission, for a pole attachment.

F. "Usable space" means the total distance between the top of the utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance.

G. "Minimum allowable vertical clearance" means the minimum clearance for communication conductors along rights-of-way or other areas as specified in the orders and regulations of the Commission.

H. "Rearrangements" means work performed, at the request of a telecommunications carrier, to, on, or in an existing support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment. When an existing support structure does not contain adequate surplus space or excess capacity and cannot be so rearranged as to create the required surplus space or excess capacity for a pole attachment, "rearrangements" shall include replacement, at the request of a telecommunications carrier, of the support structure in order to provide adequate surplus space or excess capacity. This definition is not intended to limit the circumstances where a telecommunications carrier may request replacement of an existing structure with a different or larger support structure.

I. "Annual cost of ownership" means the sum of the annual capital costs and annual operation costs of the support structure which shall be the average costs of all similar support structures owned by the public utility. The basis for computation of annual capital costs shall be historical capital cost less depreciation. The accounts upon which the historical capital costs are determined shall include a credit for all reimbursed capital costs of the public utility. Depreciation shall be based upon the average service life of the support structure. As used in this definition, "annual cost of ownership" shall not include costs for any property not necessary for a pole attachment.

J. "Telecommunications carrier" means any provider of telecommunications services that has been granted a certificate of public convenience and necessity by the California Public Utilities Commission. Nothing in the foregoing sentence is intended to exclude

Commercial Mobile Radio Service (CMRS) providers from the definition of "telecommunications carrier."

K. "Right of way" means the right to use the land or other property for placement and use of poles, pole attachments, anchors, ducts, innerducts, conduits, guy and support wires, remote terminals, vaults, telephone closets, telephone risers, and other support structures to reach customers for communications purposes.

L. "Make ready work" means the process of completing rearrangements on or in a support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment.

M. "Modifications" means the process of changing or modifying, in whole or in part, support structures or rights of way to accommodate more or different pole attachments.

N. "Incumbent local exchange carrier" means any telephone corporation that was authorized to provide local exchange telecommunications service in California on or before December 31, 1995.

III. REQUESTS FOR INFORMATION

A. A utility shall promptly respond in writing to a written request for information ("request for information") from a telecommunications carrier regarding the availability of surplus space or excess capacity on or in the utility's support structures and rights of way. The utility shall respond to requests for information as quickly as possible, which shall not exceed 10 business days if no field survey is required and shall not exceed 20 business days if a field-based survey of support structures is required.

B. Within the applicable time limit set forth in paragraph III.A and subject to execution of pertinent nondisclosure agreements, the utility shall provide access to maps, drawings, plans and any other information necessary for evaluating the availability of surplus space or excess capacity on support structures and for evaluating access to a specified area of the utility's rights of way identified by the carrier.

C. The utility may charge for the actual costs incurred for copies and preparation of maps, drawings or plans necessary for evaluating the

availability of surplus space or excess capacity on support structures and for evaluating access to a utility's rights of way.

IV. REQUESTS FOR ACCESS TO RIGHTS OF WAY AND SUPPORT STRUCTURES

A. RESPONSES TO REQUESTS FOR ACCESS

1. A utility shall respond in writing to the written request of a telecommunications carrier for access ("request for access") to its rights of way and support structures as quickly as possible, which shall not exceed 45 days. The response shall affirmatively state whether the utility will grant access or, if it intends to deny access, shall state all of the reasons why it is denying such access. Failure to respond within 45 days shall be deemed an acceptance of the telecommunications carrier's request for access.

2. If, pursuant to a request for access, the utility has notified the telecommunication carrier that both adequate space and strength are available for the attachment, and the carrier advises the utility in writing that it wants to make the attachment, the utility shall provide the carrier with a list of the rearrangements or changes required to accommodate the carrier's facilities and an estimate of the time required and the cost to perform the utility's portion of such rearrangements or changes.

B. TIME FOR COMPLETION OF MAKE READY WORK

1. If a utility is required to perform make ready work on its poles, ducts or conduit to accommodate a carrier's request for access, the utility shall perform such work at the carrier's sole expense within 30 business days of receipt of an advance payment for such work. If the work involves more than 500 poles or 5 miles of conduit, the parties will negotiate a mutually satisfactory longer time frame to complete such make ready work.

C. USE OF THIRD PARTY CONTRACTORS

1. The ILEC shall maintain a list of contractors that are qualified to respond to requests for information and requests for access, as

well as to perform make ready work and attachment and installation of telecommunications carriers' wire communications facilities on the utility's support structures. This requirement shall not apply to electric utilities which shall retain the discretion to use its own employees.

2. A telecommunications carrier may use its own personnel to attach or install the carrier's communications facilities in or on a utility's facilities, provided that in the utility's reasonable judgment, the carrier's personnel or agents demonstrate that they are trained and qualified to work on or in the utility's facilities. This provision shall not apply to electric transmission facilities, or electric underground facilities containing energized electric supply cables. Work involving electric transmission facilities, or electric underground facilities containing energized electric supply cables will be conducted as required by the electric utility at its sole discretion.

## V. NONDISCLOSURE

### A. DUTY NOT TO DISCLOSE PROPRIETARY INFORMATION

1. The utility and telecommunications carriers seeking access to poles support structures may provide reciprocal standard nondisclosure agreements that permit either party to designate as proprietary information any portion of a request for information or a response thereto, regarding the availability of surplus space or excess capacity on or in its support structures, or of a request for access to such surplus space or excess capacity, as well as any maps, plans, drawings or other information, including those that disclose the telecommunications carrier's plans for where it intends to compete against an incumbent telephone utility. Each party shall have a duty not to disclose any information which the other contracting party has designated as proprietary except to personnel within the utility that have an actual, verifiable "need to know" in order to respond to requests for information or requests for access.

### B. SANCTIONS FOR VIOLATIONS OF NONDISCLOSURE AGREEMENTS

1. Each party shall take every precaution necessary to prevent employees in its field offices or other offices responsible for making or responding to requests for information or requests for access from disclosing any proprietary information of the other party. Under no circumstances may a party disclose such information to marketing, sales or customer representative personnel. Proprietary information shall be disclosed only to personnel in the utility's field offices or other offices responsible for making or responding to such requests who have an actual, verifiable "need to know" for purposes of responding to such requests. Such personnel shall be advised of their duty not to disclose such information to any other person who does not have a "need to know" such information. Violation of the duty not to disclose proprietary information shall be cause for imposition of such sanctions as, in the Commission's judgement, are necessary to deter the party from breaching its duty not to disclose proprietary information in the future. Any violation of the duty not to disclose proprietary information will be accompanied by findings of fact that permit a party whose proprietary information has improperly been disclosed to seek further remedies in a civil action.

## VI. PRICING AND TARIFFS GOVERNING ACCESS

### A. GENERAL PRINCIPLE OF NONDISCRIMINATION

1. A utility shall grant access to its rights-of-way and support structures to telecommunications carriers on a nondiscriminatory basis. Nondiscriminatory access is access on a first-come, first-served basis; access that can be restricted only on consistently applied nondiscriminatory principles relating to capacity constraints, and safety, engineering, and reliability requirements. Electric utilities' use of its own facilities for internal communications in support of its utility function shall not be considered to establish a comparison for nondiscriminatory access. A utility shall have the ability to negotiate with a telecommunications carrier the price for access to its rights of way and support structures.

B. MANNER OF PRICING ACCESS

1. Whenever a public utility and a telecommunications carrier or association of telecommunications carriers are unable to agree upon the terms, conditions, or annual compensation for pole attachments or the terms, conditions, or costs of rearrangements, the Commission shall establish and enforce the rates, terms and conditions for pole attachments and rearrangements so as to assure a public utility the recovery of both of the following:

   a. A one-time reimbursement for actual costs incurred by the public utility for rearrangements performed at the request of the telecommunications carrier.

   b. An annual recurring fee computed as follows:

      (1) An amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way.

      (2) A utility should apportion the cost of providing space on or in a pole, duct or conduit other than the usable space among the entities so that such apportionment equals two-thirds of the cost of providing space other than usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

      (3) A utility should apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

   c. A utility may not charge a telecommunications carrier a higher rate for access to its rights of way and support structures than it would charge a similarly situated cable television

corporation for access to the same rights of way and support structures.

C. CONTRACTS

1. A utility that provides or has negotiated an agreement with a telecommunications carrier to provide access to its support structures shall file with the Commission the executed contract showing:

   a. The annual fee for attaching to a pole and supporting anchor.

   b. The annual fee per linear foot for use of conduit.

   c. Unit costs for all make ready and rearrangements work.

   d. All terms and conditions governing access to its rights of way and support structures.

   e. The fee for copies or preparation of maps, drawings and plans for attachment to or use of support structures.

2. A utility entering into contracts with telecommunications carriers for access to its support structures, shall file such contracts with the Commission pursuant to General Order 96-A, available for full public inspection, and extended on a nondiscriminatory basis to all other similarly situated telecommunications carriers. If the contracts are mutually negotiated, they shall be reviewed consistent with the provisions of Resolution ALJ-174.

VII. RESERVATIONS OF CAPACITY FOR FUTURE USE

A. No utility shall adopt, enforce or purport to enforce against a telecommunications carrier any "hold off," moratorium, reservation of rights or other policy by which it refuses to make currently unused space or capacity on or in its support structures available to telecommunications carriers requesting access to such support structures, except as provided for in Part C below.

B. All access to a utilities' support structures and rights of way shall be subject to the requirements of Public Utilities Code § 851 and

Government Order 69C. The utility shall provide carriers the option of paying their share of any modifications to expand capacity and to continue to maintain its attachment as an alternative to reclaiming needed capacity for utility use.

C. Notwithstanding the provisions of Paragraphs VII.A through VII.C, an electric utility may reserve space on its support structures where it demonstrates that: (i) prior to a request for access having been made, it had a bona fide development plan in place prior to the request and that the specific reservation of attachment capacity is reasonably and specifically needed for the immediate provision (within one year of the request) of its core utility service, (ii) there is no other feasible solution to meeting its immediately foreseeable needs, (iii) there is no available technological means of increasing the capacity of the support structure for additional attachments, and (iv) it has attempted to negotiate a cooperative solution to the capacity problem in good faith with the party seeking the attachment.

VIII. MODIFICATIONS OF EXISTING SUPPORT STRUCTURES

A. NOTIFICATION TO PARTIES ON OR IN SUPPORT STRUCTURES

1. Absent a private agreement establishing notification procedures, written notification of a modification should be provided to parties with attachments on or in the support structure to be modified at least 60 days prior to the commencement of the modification. Notification shall not be required for emergency modifications or routine maintenance activities.

B. NOTIFICATION GENERALLY

1. Utilities and telecommunications carriers shall cooperate to develop a means by which notice of planned modifications to utility support structures may be published in a centralized, uniformly accessible location (e.g., a “web page” on the Internet).

C. SHARING THE COST OF MODIFICATIONS

1. The costs of support structure capacity expansions and other modifications shall be shared by all the parties attaching to utility

support structures which are participating in the modifications on a proportionate basis corresponding to the share of usable space occupied by each carrier. Disputes regarding the sharing of the cost of capacity expansions and modifications shall be subject to the dispute resolution procedures contained in these rules.

IX. EXPEDITED DISPUTE RESOLUTION PROCEDURES

A. Parties to a dispute involving access to utility rights of way and support structures may invoke the Commission's dispute resolution procedures, but must first attempt in good faith to resolve the dispute. Disputes involving initial access to utility rights of way and support structures shall be heard and resolved through the following expedited dispute resolution procedure. Such disputes shall be heard by an Administrative Law Judge, or other designated mediator. The following time schedule should apply to each step in the dispute resolution process:

Step 1: Following denial of a request for access, parties shall escalate the dispute to the executive level within each company. After 5 business days, any party to the dispute may request Commission mediation.

Step 2: Parties shall have 10 business days to prepare for mediation or arbitration.

Step 3: If mediation fails, parties shall have 10 business days to submit short pleadings, with a written ALJ ruling within 20 business days thereafter to resolve the dispute.

Step 4: If parties choose not to accept the ALJ's ruling, an expedited complaint process may be filed, pursuant to Rule 13.2 of the Commission's Rules of Practice and Procedure.

Each party to an initial access dispute resolved in this manner shall bear its own costs, including attorney and expert witness fees.

The party identified by the arbitrator as the "losing party" shall reimburse the party identified by the arbitrator as the "prevailing

party" for all costs of the arbitration, including the reasonable attorney and expert witness fees incurred by the prevailing party.

X. ACCESS TO CUSTOMER PREMISES

A. No utility may use its ownership or control of any right of way or support structure to impede the access of a telecommunications carrier to a customer's premises.

B. A utility shall provide access, when technically feasible and not prohibited by agreements with property owners, to building entrance facilities it owns or controls on a nondiscriminatory, first-come, first-served basis.

C. This rule is not intended to provide to telecommunications carriers a right of access to private property against the wishes of the owner of such property where the Commission does not have a basis for the exercise of its jurisdiction requiring such access.

XI. SAFETY

A. Access to utility rights of way and support structures shall be governed at all times by the provisions of Commission General Order Nos. 95 and 128. Where necessary and appropriate, said General Orders shall be supplemented by the National Electric Safety Code, and any reasonable and justifiable safety and construction standards which are required by the utility.